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**REPORTS**  
**OF**  
**CASES DETERMINED**  
**BY THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF MISSOURI**

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Between July 14, and November 17, 1914.

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**PERRY S. RADER,**  
**REPORTER.**

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**VOL. 261.**

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JUN 16 1915

# JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. HENRY LAMM, Chief Justice.

HON. ARCHELAUS M. WOODSON, Judge.

HON. WALLER W. GRAVES, Judge.

HON. JOHN C. BROWN, Judge.

HON. HENRY W. BOND, Judge.

HON. ROBERT FRANKLIN WALKER, Judge.

HON. CHARLES B. FARIS, Judge.

JOHN T. BARKER, Attorney-General.

J. D. ALLEN, Clerk.

JOSEPH H. FINKS, Marshal.

# JUDGES OF THE SUPREME COURT

## BY DIVISIONS

### DIVISION ONE.

HON. ARCHELAUS M. WOODSON, Presiding Judge.

HON. HENRY LAMM, Judge.

HON. WALLER W. GRAVES, Judge.

HON. HENRY W. BOND, Judge.

HON. JAMES T. BLAIR, Commissioner.

HON. STEPHEN S. BROWN, Commissioner.

### DIVISION TWO.

HON. ROBERT FRANKLIN WALKER, Presiding Judge.

HON. JOHN C. BROWN, Judge.

HON. CHARLES B. FARIS, Judge.

HON. FRED L. WILLIAMS, Commissioner.

HON. REUBEN F. ROY, Commissioner.

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CASES DETERMINED  
IN THE  
SUPREME COURT  
OF THE  
STATE OF MISSOURI  
AT THE  
APRIL TERM, 1914.

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*(Continued from Volume 260.)*

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**SAM B. STROTHER, Administrator of Estate of  
EDWARD B. PARKER, v. KANSAS CITY  
MILLING COMPANY, Appellant.**

**Division One, July 14, 1914.**

- 1. APPEAL: From Motion Granting New Trial.** It is assumed, and not decided, in this case, where a new trial was granted on account of error in defendant's instructions, that a defendant may appeal from an order granting to plaintiff a new trial (and have the order reversed) because plaintiff at the trial did not make out a case.
- 2. NEGLIGENCE: Fellow-Servant: Superintendent: Directing Work in Hand.** A superintendent of a mill, in full control of its management and of all men employed therein, who directed a millwright, employed for a month to make alterations in bleachers and working under his directions, and the alterations being completed and ready for testing, to assist him in the hazardous work of putting on a belt connecting the bleachers with the power, was a vice-principal, and not a fellow-servant of the millwright; and though the immediate work was extra hazardous and the field of operation was unreasonably unsafe

and the injury was due to the superintendent's own negligence in not using proper care to protect the millwright, the doctrine of fellow-servant does not bar a recovery.

3. ———: Putting Belt on Pulley: Crippled Hand of Superintendent: Instruction to Disregard: Limiting Effect: New Trial. Where the plaintiff was injured by the fact that the superintendent pushed a heavy belt onto a dead pulley while plaintiff's ladder was leaning against the shaft as he was endeavoring to "hand up the slack," without giving warning to plaintiff that the belt was about to begin to "crawl," whereby plaintiff was thrown to the floor, and the petition described the superintendent as "physically incapacitated to do such work," and plaintiff testified that he did not know the superintendent had a crippled hand, and the superintendent denied that its crippled condition interfered with his use of it, and plaintiff's instructions tendered no issue on the condition of that hand, it cannot be held that an instruction for defendant telling the jury that "there is no evidence in the case that the condition of the superintendent's left hand directly caused, or directly contributed to cause, the plaintiff's injuries, and your finding on that issue must be for defendant," merely limited the effect of the evidence, since it was so worded as to entirely destroy its effect. Nor, on the other hand, will it be held, since neither on defendant's nor plaintiff's theory did the crippled hand connect itself in a causal way with the accident, that the giving of the instruction was a sufficient ground for granting plaintiff a new trial.
4. ———: ———: Instruction: Diverting Jury's Minds From Issue. An instruction should focus the minds of the jury on the real issues of the case, and not divert them therefrom. It should not lug in imaginary defenses unsupported by the evidence. Where plaintiff was assisting the superintendent of a mill to place a heavy belt upon a dead pulley, and both sides agree that it was the duty of the superintendent to give him notice when the belt began to "crawl" onto the pulley, and the vital issue is whether or not such notice was given, an instruction telling the jury that, though they may believe from the evidence that the superintendent "was negligent in the performance of the work in which he and plaintiff were engaged, and such negligence was the direct cause of plaintiff's injuries, yet if you further believe from the evidence that such negligence consisted solely in the superintendent's choice of the method of performing such work," you will find for defendant, is erroneous, since there was no evidence tending to show that "the choice of the method of performing such work" was the *only* negligence of the master.
5. ———: Assumption of Risk: No Basis of Fact. Where the vital question in the case is whether the master gave the

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notice to the employee which it was his duty to give, and for failure to give which the injury resulted, there is no room in the case for an instruction on assumption of risks. Risks assumed by the servant are those which remain after the master has exercised ordinary care. And in this case it is held that the natural effect of such an instruction was to confuse and mislead the jury.

6. ———: **Due Care: High-Sounding Definition.** It is better that instructions use the words "due care" and then define what such care is, and not tell the jury that plaintiff "was bound to use his senses, intelligence and experience"—words calculated to lead astray the minds of common-sense jurors.

*Appeal from Jackson Circuit Court.—Hon. Edward E. Porterfield, Judge.*

**AFFIRMED.**

*Boyle & Howell, Edward J. White, E. R. Morrison, D. W. Johnson and Joseph S. Brooks for appellant.*

(1) Instruction number 2, given at request of appellant, was properly given. There was no evidence in the case tending to prove the converse. *Sotebier v. Transit Co.*, 203 Mo. 721; *Canaday v. United Railways Co.*, 130 Mo. App. 289; *Peck v. Traction Co.*, 131 Mo. App. 141. Evidence having been admitted as to the fact it was proper for the court to limit its effect by instruction. (2) Instruction number 4, given at appellant's request, was properly given. It is horn-book law that the master has the right to choose the method of performing his work within the boundaries of reasonable care, and that the servant, in accepting the employment, impliedly agrees to perform his work his way, and cannot hold him for injuries resulting from dangers incidental to the work as he conducts it. *Berning v. Medart*, 56 Mo. App. 450; *Mack v. Railroad*, 123 Mo. App. 531; *Coin v. Lounge Co.*, 222 Mo. 506; *Steinhouser v. Spraul*, 127 Mo. 562; *Minnier v. Railroad*, 167 Mo. 112; *Chrismer v. Tel. Co.*, 194 Mo. 189; *Alcorn v. Railroad*, 108 Mo. 97; *Brands v. Car*

Co., 213 Mo. 709; *Blundell v. Mfg. Co.*, 189 Mo. 558. (3) Instruction number 5, given at appellant's request, was properly given. It was in the form of the usual instruction on assumption of the risk as to form and has been approved by this court. It merely told the jury that the servant assumes the ordinary and natural risks incident to the service. *Renfro v. Railroad*, 86 Mo. 309. (4) Instruction number 7, given at appellant's request, is in proper form and enunciates a plain principle of law supported by many decisions in this State. *Alcorn v. Railroad*, 108 Mo. 97; *Gibson v. Bridge Co.*, 112 Mo. App. 598; *Watson v. Coal Co.*, 5 Mo. App. 366; *Bernin v. Medart*, 56 Mo. App. 448.

*Shannon C. Douglass, Isaac N. Watson and Walter W. Calvin* for respondent.

The court committed error in giving, at the instance of the defendant, instructions 2, 4, 5, and 7. Therefore, no error was committed by the court in sustaining plaintiff's motion for a new trial, for the reasons assigned by the court, that it erred in giving certain instructions in the trial of this cause. (1) Whether or not the physical condition of Brown's hand was such, as shown by the testimony, as to directly contribute to cause him to allow the belt to slip over the face of the pulley, thus causing it to suddenly start, was clearly a question of fact, and should, therefore, have been submitted to the jury under an appropriate instruction. (2) Plaintiff by instruction number 4 was made to assume the negligence of the master, and the master, by becoming negligent in the selection of the method to be pursued in the performance of the work, was exonerated from liability for injuries consequent thereto. This instruction, then, becomes and is a plain statement of the old discarded doctrine of assumption of risk of the master's negligence. *Blan-*

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ton v. Dold, 109 Mo. 64; Pauck v. Dressed Beef Co., 159 Mo. 467; Wendler v. People's, etc., Co., 165 Mo. 527; Curtis v. McNair, 173 Mo. 270; Charlton v. Railroad, 200 Mo. 413; George v. Railroad, 225 Mo. 364; Bien v. Transit Co., 108 Mo. App. 399; Strickland v. Woolworth & Co., 143 Mo. App. 528; Courtier v. Merc. Co., 146 Mo. App. 517; Gambino v. Coal & Coke Co., 164 S. W. 264. Instruction number 5 constituted error sufficient to sustain the action of the court in awarding a new trial of this cause, and is erroneous, for the following reasons: (a) There was no testimony upon which the same might be predicated; (b), all the testimony was to the effect that the usual way of putting on a belt was to put it on the dead pulley first, and then shift it upon the live pulley; (c), yet, by reason of the situation and construction of the shaft in question, and the location of the live pulley, the belt could not be adjusted in that manner; (d), it also assumes, and contrary to the testimony, that this belt was being placed over these pulleys in the usual and ordinary way. The giving of instruction number 7, also constituted error sufficient to warrant and sustain the ruling of the court, and is erroneous, for the reason that it does not correctly define the doctrine of contributory negligence. (a) It directed the jury to return a verdict in favor of the defendant, without regard as to whether or not the dangers attendant upon plaintiff's performing his task were so obviously apparent that a reasonably prudent man would not attempt the performance of the task. (b) It directed the jury to return a verdict for the defendant if he knew, or could have known, of any dangers, whatsoever, incident to the performance of the task, notwithstanding such dangers, if any, were the result of the negligence of the master. (c) It made plaintiff to assume the risk of being injured by his master's negligence, and, *arguendo*, told the jury that plaintiff could not recover, no matter to what extent the master had become negli-

gent. *Jewell v. Bolt & Nut Co.*, 231 Mo. 176; *Corby v. Telephone Co.*, 231 Mo. 417; *Clark v. Railroad*, 234 Mo. 396. It was unquestionably the duty of defendant to exercise reasonable care to avoid injuring plaintiff, and it therefore became the duty of its vice-principal, Brown, to warn or notify plaintiff of the danger to which he, plaintiff, was about to be subjected by the starting of the belt in question, and Brown's failure so to do constituted actionable negligence on the part of the defendant. *Gayle v. Foundry Co.*, 177 Mo. 427; *Koerner v. Car Co.*, 209 Mo. 141; *Enloe v. Foundry Co.*, 240 Mo. 444; *Butler v. Railroad*, 155 Mo. App. 287; *Ryan v. Railroad*, 115 Fed. 197; *Railroad v. Shaw*, 116 Fed. 621. Even though the method by which Brown, the vice-principal, and Barker, the servant, were attempting to adjust the belt in question, was attendant with more dangers than were other methods which might reasonably have been employed, yet, on account of Brown's having chosen to adopt the former, and summoning plaintiff to assist him therein, it did not, and does not, lie in the defendant's mouth to assert that on account of its having chosen a more dangerous method for the performance of that task, and on account of plaintiff's assisting therein, he (plaintiff) should be denied a recovery. *Hutchinson v. Safety Gate Co.*, 247 Mo. 116. And this principle applies, with the result that the defendant would still be held liable where the servant is injured through the negligence of the vice-principal, in consequence of a breach of some duty owing to such servant by the master, even though such vice-principal was, at said time, also temporarily acting in the capacity of a common laborer. *Moore v. Railroad*, 85 Mo. 588; *Dayharsh v. Railroad*, 103 Mo. 575; *Bluedorn v. Railroad*, 108 Mo. 448; *Miller v. Railroad*, 109 Mo. 350; *Russ v. Railroad*, 112 Mo. 45; *Donahoe v. Kansas City*, 136 Mo. 670; *Bane v. Irwin*, 172 Mo. 317; *Fogarty v. Transfer Co.*, 180 Mo. 511; *Schwychart v. Barrett*, 145 Mo.

App. 332; Taylor v. Railroad, 6 L. R. A. 586; Railroad Co. v. Skola, 183 Ill. 454; Norton v. Nadobak, 190 Ill. 599.

LAMM, J.—In a case sounding in tort in the Jackson Circuit Court, wherein the damages were laid at \$15,000, the jury found for defendant. Thereat, on motion, the court ordered the verdict set aside, granting a new trial on the ground of error in defendant's given instructions. Thereat defendant, a corporation, appealed from such order. Plaintiff dying pending appeal, Strother, administrator, is substituted. For convenience we continue to use "plaintiff."

Defendant owned a flouring mill in Kansas City of a capacity of six hundred barrels daily. In this mill were devices known as bleachers, agitators, and conveyors operated by belts, pulleys, and shafting and run by steam power. These bleachers, etc., were devices to whiten the flour by the use of a current of air and electricity. One Brown was defendant's superintendent and in full control and management of the mill and all the men employed therein. About four weeks before the accident, plaintiff, a millwright, was employed by superintendent Brown to make some alterations in or put in some new bleachers. The bleachers or alterations were completed ready for testing, and while to that end plaintiff was assisting Brown in putting on a belt connecting the bleachers with the power he was thrown off a ladder and severely injured by the sudden and unexpected starting of the machinery. His suit for damages is bottomed on those injuries, and there is no question here as to their gravity.

It will not be necessary to set forth even a summary of the petition; for plaintiff's principal instruction was within its allegations and we reproduce that to show the pleaded grounds of negligence and the theory on which recovery was sought, viz.:



“The court instructs the jury that it was the duty of defendant to exercise ordinary care to furnish plaintiff a reasonably safe place in which to do his work, and to do no act of negligence, as defined by these instructions, which would render such place not reasonably safe for plaintiff to perform the usual and ordinary work required of him by defendant, while engaged in its performance, taking into consideration the kind and character of work to be done and the place in which it was to be done. If, therefore, you shall find and believe from the evidence that on or about the 20th day of August, 1904, plaintiff was in the employ of defendant as millwright, at its mill in Kansas City, Missouri; and if you shall further find and believe from the evidence that the defendant, at said time and place, had in its employ Patrick Brown as superintendent or head-miller at its said mill, and that said Brown had authority to hire and discharge plaintiff and direct him what to do and how to perform his duties in said mill; and if you shall further find and believe from the evidence that on or about the said date plaintiff was ordered and directed by said Brown, in his capacity as superintendent or head-miller as aforesaid, to get a ladder and go upon same, and thereby assist said Brown to put a belt upon the pulley mentioned in evidence; and if you shall further find from the evidence that, in obedience to said order, plaintiff did go upon said ladder, and while standing thereon it became reasonably necessary for plaintiff to occupy a stooping position for the purpose of raising the slack in said belt, and that he did occupy said stooping position on said ladder for the purposes aforesaid at and immediately before the happening of the injury complained of, and if you shall further find and believe from the evidence that while plaintiff was in such stooping position on said ladder for the purpose aforesaid, if you find he was in such position, defendant’s superintendent or head-miller Patrick Brown, without

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warning to plaintiff without plaintiff's knowledge of his intention so to do, negligently and suddenly threw the belt into position on said pulley to start said belt and pulley revolving; and if you shall further find and believe from the evidence that by reason of such act of suddenly throwing said belt upon said pulley and starting it to revolving as aforesaid, if you find he did so, the position or place in which plaintiff was working was rendered extra or unusually hazardous and not a reasonably safe place for plaintiff to work, and was not a usual and ordinary danger of such employment; and if you shall further find from the evidence that said Brown knew, or by the exercise of ordinary care on his part could have known, of the position in which plaintiff was situated immediately before and at the time of the putting on of said belt, and of the increased and unusual hazard, if any, of starting said belt and pulley while plaintiff was in such stooping position, if you find he was in such stooping position at said time, and that said Brown, under all the facts shown in evidence could, by the exercise of ordinary care on his part, have warned plaintiff that he was going to put said belt on said pulley in time to have permitted the plaintiff to have let go of said belt, if you find he had hold of the same; but said Brown failed to do so; and if you shall further find and believe from the evidence that at said time and place plaintiff was in the exercise of such care for his own safety as a reasonably prudent person would exercise under like or similar circumstances, and that as a direct result of said Brown's throwing said belt into position to start said belt and pulley revolving, without any warning to plaintiff, if you find that he did so without any warning to plaintiff, and that he thereby put the plaintiff in a position of increased and unusual danger or hazard as aforesaid, if any, and that as a direct result thereof plaintiff was thereby thrown from his position on said ladder to the floor of said mill and injured

thereby, as a direct result thereof, then your verdict must be for the plaintiff."

Plaintiff introduced evidence tending to prove the facts hypothesized and outlined in that instruction and the averments of his petition. The case will proceed on appeal more understandingly by summarizing the tendency of plaintiff's proof, viz.: The bleachers, agitators, etc., were in an upper story of the mill. The shaft operating them was close to the ceiling of the story below. This shaft may be called the "upper shaft." On this upper shaft was a pulley forty inches in diameter and ten inches wide, which, for the purposes of this case, we will call the "dead pulley." The edges of this pulley were arranged so that the pulley had a rise towards the center, called a crown. In the room below this upper shaft close to the ceiling was another shaft directly connected by gearing and belts to the power. This shaft may be called the "lower shaft." On this lower shaft was a pulley thirty inches in diameter and ten inches wide, which, for the purpose of this case, will be called the "live" or "driving pulley." It revolved at the rate of 280 revolutions per minute. The live pulley was not directly under the dead one, but to one side so that when the belt connecting the two was on it stood at an angle of, say, forty-five degrees. Holes were made in the floor at the right places above the live pulley through which the endless belt passed. The alterations had been made in the bleaching devices or new ones installed by plaintiff and another millwright, Bennett, and the two had tested the machinery by an old light six-inch belt which was found insufficient. Thereupon, by direction of Brown, the two made a new heavy stiff eight-inch belt of two-ply leather, about seventy-five pounds in weight, and sixty-four feet long. They put it over the upper and lower shafts and made an endless belt of it by bevelling the ends (making tongue laps) and fastening them together with "cement" and by hammering

the tongue laps and leaving the cement to "set" until ready for use. Plaintiff, while experienced in putting on belts, had never put on one with Brown and was not familiar with his ways and methods. Brown's left hand was crippled and plaintiff did not know that fact. At a certain time Brown directed plaintiff to assist him in putting on the new belt that hung over the upper shaft hard by the dead pulley, and, as we understand it, also hung limp about the driving or live pulley on the lower shaft. The usual way of putting on such a belt is to first put it on the dead pulley and then on the live one, but in this case that plan was impossible because there was no room on either side of the live pulley for the belt to play in. Plaintiff knew that fact and knew the belt would be brought in contact with the live pulley first and while in such contact the edge of the belt above would be pressed or slipped on the dead pulley until by friction the power from below would be communicated through the driving pulley to the dead one. All sides agree that in putting on a belt in that way there comes an instant of time, as the belt is being shoved over toward the crown of the dead pulley, when it begins to bite or feed (one witness used the term "crawl on") and that such fact can be "felt" by the man pressing it on. When that precise time is reached, then, by pressure on the edge of the belt by a gloved hand, it goes on and the full power is at once communicated from the driving to the dead pulley. In order to put on a heavy belt like the one in question in said way and with ladders (as here) two men are necessary; one to put the belt on the dead pulley, and the other to lift the belt, or, as expressed by plaintiff, "to hand up the slack," in this instance several feet. When Brown directed plaintiff to assist in putting on the belt, plaintiff suggested that Bennett take part. We get the idea that plaintiff's proposition was that Bennett act instead of Brown and that plaintiff preferred to work with Ben-

nett because putting on a new, stiff and heavy belt in the way proposed was a ticklish operation attended with danger and it is better for the two men to have worked together till they think and act in accord. Brown did not take plaintiff's suggestion but directed plaintiff to assist him and plaintiff acquiesced. Brown was a man of experience in putting on belts and did a great deal of it as a part of his daily routine of duty as superintendent; sometimes with the assistance of others. The shaft carrying the dead pulley was so far from the floor that ladders were necessary to stand on. Two were at hand, to-wit, a long and a short one. Brown took the long ladder and left the short one for plaintiff. The significance of this was that Brown would be higher than plaintiff in putting on the belt and this in turn meant that Brown, having the farther reach up, would put the belt over the dead pulley and that plaintiff, from a lower position, would pull up the slack and hand it to Brown. That was the way it was done. According to plaintiff's evidence the upper end of Brown's ladder rested either on a joist or on the shaft to one side of the dead pulley. Plaintiff thinks it was the joist at the ceiling. The upper end of plaintiff's ladder rested against the shaft on the other side of the dead pulley. Defendant put in proof tending to show that plaintiff's ladder rested against a wheat bin, or "stock hopper," a little to one side, but the divergence is immaterial. When Brown took his position on the long ladder to put on the belt, he was in a position to look down on plaintiff in position on the short ladder. On his part plaintiff would also look down but away from Brown. Standing on the narrow rung of the ladder, to lean over and lift so heavy and stiff a belt, it was necessary for plaintiff to brace himself against something, and he did brace himself against the pulley. In this condition plaintiff handed up slack once and Brown took it. Plaintiff then reached down to pull up more of the

slack, warning Brown at the time to be careful. All sides agree that it was customary and necessary for the man manipulating the belt on the pulley to give warning to the other man when the belt began to take hold or crawl, so that he might let loose or otherwise protect himself against its going on with the full force of the driving pulley. Plaintiff expected such warning but says he never received it. To the contrary, according to his testimony, when his face was toward the floor and he could not see Brown's hands or the position of the belt on the dead pulley, Brown put the belt on while plaintiff, so on the rung of the ladder, was in the very act of stooping over and pulling on it from below to assist him, and, the motion going on suddenly and without warning, he was thereby thrown violently to the floor and was gravely injured in having his hip fractured.

Brown, testifying for defendant, says he gave warning to plaintiff at the crucial instant, but at the same time says he did not know plaintiff had hold of the belt at that time or at any other time. As we gather it, his idea was that plaintiff was to use his hands in turning the dead pulley, not to hand up the slack. In other words, he, Brown, with his one hand was to lift the seventy-five pound stiff belt and put it on the pulley without plaintiff's touching it. To contradict the theory that he was expected to manipulate the pulley itself, plaintiff testified (and he had other testimony to the effect) that it would take five- or six-horse power to turn the dead pulley.

With the proof as outlined, defendant offered a demurrer at the close of plaintiff's evidence in chief and again asked a mandatory instruction at the close of the whole case, both of which were refused, and now on appeal its counsel argue not only that the questioned instructions were good, but that plaintiff and Brown were fellow-servants in and about the matter of put-

ting on the belt and therefore plaintiff made no case for the jury.

Plaintiff in turn complains of the giving of four instructions (two, four, five and seven) on behalf of defendant, all of which will appear in due course. His counsel argue that the motion for a new trial was well ruled because of error in those instructions; further that though the court did not specify other grounds in its order sustaining the motion, yet if there be other grounds for a new trial present then such other grounds sustain the order granting a new trial, and, on this head, his counsel invoke the doctrine that in granting a new trial there is a discretion in the trial court where the verdict is against the weight of the evidence. From that angle also they contend (that element being present and noticed in the motion for a new trial) the order granting a new trial was well enough. Such substantially is the case. Any other facts germane to a disposition of points ruled will appear further on in due order.

I. *Of defendant's demurrer (and herein of the mandatory instruction).*

In their original brief counsel did not make the point that Brown and Barker were fellow-servants and hence the demurrer lay. It is made in their reply brief for the first time, and is there justified because plaintiff insists on sustaining the order granting a new trial, not only on the specifications made by the trial judge, but on other grounds as well. The appearance of the point is, therefore, late and somewhat by way of after-thought or counter thrust. Assuming, without deciding, that a defendant may appeal from an order granting a new trial and have the order reversed because plaintiff at the first trial did not make out a case (thereby taking away his chance of making one at the second trial) we proceed to dispose of the demurrer

and the mandatory instruction on their merits, applying the theory that if plaintiff made no case he could not complain of the verdict, or of defendant's instructions (*Fritz v. Railroad*, 243 Mo. l. c. 69) and hence was not entitled to a new trial.

In our opinion the doctrine of fellow-servant does not bar recovery in this case as a matter of law. This because: There is no dispute on this record but that Brown was the superintendent of the mill and as such had exclusive supervision of its operations and of the men employed therein, including the two millwrights, Bennett and Barker. The whole case runs on the theory that Brown both in rank, capacity and act represented the master. To say that Brown and Barker were in a common employment is to say that the captain of a ship and a sailor are in common employment, because they are both, in a general sense, engaged in sailing the ship. The facts, then, make it a typical case of Superintendent Brown being the vice-principal of the corporate master. Unless his eye, voice, hand and acts were the master's then the master on this record was absent from that mill and neither acted *per se* or *per alium* there at any time. This general relation obtained, too, in the very act of putting on the belt. Brown, for the master, appointed the time, directed the method and assumed an attitude of a superior to a subordinate in the performance of that service. Let us copy a bit of the record on the point and from that discern the trend of the whole of it (Brown being on the stand):

"Q. Tell us what you said to him. A. Well, sometime before we put the belt on I was up on the floor he was working on, and I told him, I says, 'We will put the belt on, Mr. Barker.' Q. Speak up so that I can understand. A. I says, 'We will put the belt on when you get your work finished up, when you get that job completed.' He was connecting the power of the lower part of the agitator. Q. Didn't you mean by that a direction to come and assist you? A. I told him we



would put the belt on. Q. You were right there and had a right to direct him, didn't you? . . . A. *He was at work under my directions and instructions. . . .* Q. *He was there subject to your direction and instruction?* A. Yes, sir. Q. And you told him, you said you would put that belt on. Didn't you mean that as a direction to assist whenever you got ready to do so? A. It would mean that. Q. That was what you meant him to understand, wasn't it, when you said that? A. Yes, sir."

It would be unprofitable to reargitate the vexed question: Who is a fellow-servant? Or to reformulate or reannounce the doctrine of this court in that behalf. Error often lurks in generalities and no rule can be laid down that would fit all cases. It would be a bold judge who said that appellant courts had always been able to hold a steady and even voice in promulgating or applying general principles on this head. Cases may be found that approach the matter from this, that or the other angle (including that of "dual capacity"); but no soundly reasoned case can be found, I think, where the master had a conceded vice-principal present, as here, and where such vice-principal personally by virtue of being master and in the line of his rank and duty took charge of a transaction and injured an employee negligently by exposing him to extra hazard, or by making his field of operations unreasonably unsafe, where the doctrine of fellow-servant was allowed to bar recovery. The reasoning and facts of many cases sustain that view of it. For example: *Hollweg v. Telephone Co.*, 195 Mo. l. c. 156 et seq., and cases cited: *Russ v. Railroad*, 112 Mo. 45; *Burkard v. Rope Co.*, 217 Mo. l. c. 480 et seq.; *Bien v. Transit Co.*, 108 Mo. App. 399; *Dayharsh v. Railroad*, 103 Mo. l. c. 576 et seq.; *Miller v. Railroad*, 109 Mo. l. c. 356 et seq.; *McIntyre v. Tebbetts*, 257 Mo. 117. In the *Miller* case, *supra*, BLACK, J., summarizes the grounds of liability in this acceptable way:

“There is no doubt but a foreman or other representative of the master may occupy a dual position; that is to say, he may at the same time be a fellow-servant and an agent or representative of the master. There are certain duties which are personal to the master, and for the nonperformance of which he is liable to his servants. These duties may be delegated to a foreman or even to a servant, and the master is still liable for their nonperformance. Again, cases often arise where the master becomes liable by reason of the fact that he undertakes by himself or through a representative to do certain things which might have been left to the servant to perform.”

The premises considered, defendant's demurrer and mandatory instruction were well ruled below.

II. *Of the given instructions for defendant alleged to be erroneous.*

Of the series of instructions given for defendant, plaintiff complains now of the second, fourth, fifth and seventh, and his counsel argue that the order granting a new trial may stand on the theory one and all were erroneous.

“2. The jury are instructed that there is no evidence in this case that the condition of Mr. Brown's left hand directly caused, or directly contributed to cause, the plaintiff's injuries (if any), and your finding on that issue must be for the defendant.

“4. Even if the jury believe from the evidence that the witness Brown was plaintiff's superior officer, and that said Brown was negligent in the performance of the work in which he and plaintiff were engaged at the time plaintiff claims to have been injured, and that such negligence was the direct cause of plaintiff's injuries (if any), yet if you further believe from the evidence that such negligence consisted

solely in Brown's choice of the method of place performing such work, and that plaintiff and defendant were, or by the exercise of ordinary care should have been, equally advised that such method was not reasonably safe (if it was not), and of all the risks and dangers (if any) incident to the performance of such work according to such method, then your verdict must be for the defendant.

"5. The jury are instructed that the plaintiff in entering the employ of defendant and continuing to work for it, assumed the risks (if any) there were growing out of any danger there may have been in doing the work at which he was engaged in the usual and ordinary way. If therefore it appears from the evidence that the plaintiff's injuries (if any) were the result of such risk, then defendant is not in law at fault therefor, and it is your duty, without regard to the other questions in the case, to return a verdict in its favor.

"7. Plaintiff was bound to use his senses and intelligence and experience in and about the doing of his work, and if he failed to use either to the extent to which a person of ordinary care of his age and experience would have used them under the circumstances as they existed at the time he was injured, and if such failure directly contributed to cause his injuries (if any), then he is not entitled to recover in this case, and you must find for the defendant, and this is so even though you should find that the defendant was also negligent or failed in some duty it owed to plaintiff."

(a) To determine whether defendant's instruction number two was correct, attend to more of the record. The petition describes superintendent Brown as a man "who was physically incapacitated to do such work," meaning thereby the work of putting on such a belt in the way adopted. Evidently at least defendant's counsel had made reference in his opening statement to a crippled hand of Mr. Brown, and had ad-

vanced the theory that plaintiff knew all about it. We conclude so from the subjoined questions propounded to plaintiff when on the stand in chief and the answers thereto:

“Q. Now, you heard Mr. Boyle’s statement here about Mr. Brown having a crippled hand? Did you know about that? State what the facts were in regard to that. A. That is a false statement; I didn’t know it. I never knew he had a crippled hand until after the thing happened, because we had never done any work with him or been intimately associated with him. Q. Which hand was it that was crippled? A. I think it is his left hand.”

Presently when one Remley was on the stand for plaintiff the latter’s counsel sought to show that Brown had a crippled hand. Thereat defendant’s counsel objected to the testimony because it “had no part or cut no figure in this accident . . . as shown by plaintiff’s own testimony.” On this objection plaintiff’s counsel withdrew the challenged question. With the record in this fix, defendant’s counsel, not content, later opened up the matter anew on their own hook. When Brown was on the stand one of them propounded questions and received answers as follows:

“Q. Is this hand impaired as to strength by reason of the bent condition of these two fingers? A. No, sir, I have as much strength as I ever had in the right hand. Q. Did the condition of this hand in any way prevent you in doing the work of putting on that belt? . . . Q. Well, just describe to the jury in what way you used or did use this hand, if at all, and what, if anything, the condition of the hand interfered with or affected it? A. Well, I didn’t use this hand at all. All I used this hand for was on the ladder to support myself on the ladder, hold the ladder. I put the belt on—raised the belt with my right hand.”

When plaintiff came to his instructions, he tendered no issue whatever on the condition of Brown’s

left hand and made no reference to the physical incapacity mentioned in his petition.

The real question, then, is: In the light of the whole record was it error to give instruction number two for defendant?

To support the instruction defendant's counsel argue after this fashion: "It would appear from the record that the issue was not before the court, but evidence being admitted tending to show that the witness Brown had a crippled hand it was proper for the court to limit its effect by instruction." But it will be observed that the instruction does not *limit* the effect of the evidence. *Contra*, it is so worded as to entirely *destroy* its effect. Presently we will set forth facts from which we can get at Brown's theory of how the accident happened, but for present purposes it is sufficient to say that neither in his nor in plaintiff's theory did the crippled left hand of the superintendent connect itself in a causal way with the accident. We conclude, then, that although defendant must stand sponsor equally with plaintiff for lugging Brown's crippled hand into the case, and though the court, without committing error, might have left the evidence stand as a circumstance for what it was worth in connection with all the other facts and circumstances, yet we cannot see that the merits of plaintiff's case were materially affected by the instruction, even as broad as it is. Hence if there was no other error at the trial, the order granting a new one could not well stand on such a narrow and precarious point.

(b) In disposing of the fourth instruction, attend further to the record. Defendant's principal witness, its only reliance, was Superintendent Brown. As already indicated, there is substantial agreement between him and plaintiff on the necessity of notice to the helper at the precise time the principal actor "feels" the belt beginning to crawl or bite on the dead pulley. Now, plaintiff says he received no such notice, though

he was depending on it. Brown seems to admit the need of it and the right of dependence on it. He acquits himself by saying he gave it in this form, "Look out," and received the response from plaintiff, "All right," or "Let her go." As in the very old and quaint doctrine noticed by Abbott and borrowed from Roccus (Abb. on Shipping, \*371): "If the mice eat the cargo and thereby occasion no small injury to the merchant, the master must make good the loss, because he is guilty of a fault; yet if he had cats on board his ship he shall be excused"—so here, this master stands on notice for his excuse. Notice is the cat that eats the mouse, negligence. It would be to read this whole record with inattention not to see that the the sharp turning point, the vital issue, in the case, rests on the timely giving of that notice. If the jury believed Brown on that issue, then plaintiff's case falls to the ground. If the jury believed plaintiff, then a clear case of negligence was made out on the part of the master whose *alter ego* Brown was; and so, in effect, the case was put to the jury in plaintiff's chief (and only general) instruction hereinbefore set forth. The ladders used by Brown and plaintiff had iron spikes below, but nothing to fasten them above. As said, Brown's leaned against the shaft or a ceiling joist, and plaintiff's leaned against the shaft or a "stock hopper." Mr. Brown says, in substance, that the belt was stiff and required strong pressure to put it on the dead pulley, and that while giving such pressure and after the "look out" notice, his ladder thereby was caused to slip away from the pulley and so far up-set that he jumped to the floor. As we read the record there is no causal connection between the shoving over of the upper end of Brown's ladder and the accident to plaintiff. The inference to be drawn from Brown's version is that his pressure on the belt shoved his own ladder over, and that the notice he gave to plaintiff was timely and sufficient to put him on his guard. In this condition of things de-

fendant asked and received instruction number four. It told the jury to find for defendant although the master was negligent and although such negligence was the direct cause of the injuries, provided the jury found further that the master's negligence consisted "solely" in Brown's choice "of the method of place [*sic*] performing such work," and also found that both the master and plaintiff were, or by the exercise of ordinary care should have been, equally advised that such method was not reasonably safe, and equally advised of "all the risks and dangers (if any) incident to the performance of such work according to such method." That instruction was not the law of this case. It is wholly unsupported by the evidence. There was none tending to show that the choice "of the method of place performing such work" (whatever that may mean) was the *only* negligence of the master. The broad and accepted current of the proof on both sides is directly to the contrary. The negligence of the master, if any, was in the failure to give notice at the crucial moment that the belt was going on. The method of performing the work called for that notice. The instruction eliminates that idea, and, while it is not clear precisely what it does mean, yet it is plain enough that it directs the jury's attention to a feigned or false issue and away from the place or issue where the shoe actually pinched. The quail uses that device to protect its young brood when surprised by an intruder. One Alcibiades used it. I remember to have read in an idle hour (*i. e.*, before I came on this bench) that he had a very fine dog with a beautiful tail, costing (that is, the dog did) a thousand dollars or so. This dog was a favorite in Athens (say B. C. 420) and its tail (proudly carried) was much admired by the versatile and artistic citizens of that town. Having cut off his dog's tail, and being brought to book therefor (for all I know before the dicasts at the judgment-seat) Alcibiades justified himself by saying he cut it off so that the

Athenians would talk of that and say nothing worse of him. But the foregoing plan of obscuring the issue by putting forward something else to talk about is no working theory in the administration of justice. The precept is: The law is always more praised when it is consonant with reason. Plaintiff was gravely injured and, if his story be true, had a meritorious case. He was entitled to have the jury's mind focused on, not diverted from, the issues. Instruction number four did not fill that office, for that its tendency was to litter up the mind of the jury with a feigned issue. If the premises announce sound doctrine, as we think they do, then the order granting a new trial stands safely on the theory that instruction number four was erroneous.

(c) And this brings us to defendant's instruction number five on assumption of risk. Assumption of risk has been defined by a discriminating writer as "a term or condition in a contract of employment, either express or implied from the circumstances of the employment, by which the employee agrees that dangers of injury ordinarily or obviously incident to the discharge of his duty in the particular employment shall be at his own risk." [Bl. L. Dict.] The words "or obviously" connect themselves logically with the doctrine of *volenti non fit injuria*, and are broad enough to cover the idea (among others) of known dangers voluntarily encountered. In this jurisdiction it seems that to settle liability for encountering dangers arising from the master's negligence that are so glaring and imminent an ordinary prudent person would not encounter them, reference is had to the doctrine of contributory negligence (sounding in tort) and not to the assumption of risk (sounding in contract); for in this jurisdiction it has become settled doctrine that the servant does not assume the risk of his master's negligence. [George v. Railroad, 225 Mo. l. c. 408 et seq.] The Missouri doctrine is that there is another term



express or implied in the contract of employment between master and servant, to-wit, that the master will exercise care to protect his servant by (among other ways) providing him a reasonably safe place to work; and that when the assumption of risk on the part of the servant and the aforesaid assumption on the part of the master are allowed to proceed hand in hand, as they should in holding the scales of justice true, it results that the risks assumed by the servant are those which remain after the master has exercised ordinary care. [Charlton v. Railroad, 200 Mo. l. c. 433; Curtis v. McNair, 173 Mo. 270.] Assumption of risk and contributory negligence are two doctrines that so overlap and intermingle on certain phases that in some jurisdictions the obvious or known-danger-voluntarily-encountered theory is put under the head of assumption of risk. A great jurist, Chief Justice LEMUEL SHAW, first announced the doctrine of assumption of risk in this country in 1842 in the Supreme Court of Massachusetts in the celebrated case of Farwell v. Boston, etc., R. R. Co., 4 Metc. 49. [2 Bailey, Pers. Inj. (2 Ed.), sec. 353; 1 White, Pers. Inj., p. 417, note 3.] In defining it he does not seem to include the element of known danger voluntarily encountered as Black does, but puts the matter in this guarded way:

“The general rule. resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjudged accordingly.”

But philosophizing about the matter at this day is unprofitable. This court has a doctrine, as said, to-wit, that the master cannot impliedly or expressly contract against his own negligence, hence the servant does not assume the risk of the master's negligence;

and that doctrine must supply the test or touchstone for the instruction in hand. [See cases supra; Hutchinson v. Richmond Safety Gate Co., 247 Mo. 71; Chambers v. Chester, 172 Mo. 461.]

In instruction number five the doctrine of assumption of risk is put to the jury as an abstraction of law. Broadly interpreted, it is likely its form would pass muster as an abstraction, although critically speaking it puts the cart before the horse, it makes the injuries result from the risk instead of from the danger ordinarily incident to the discharge of duty in the given employment. But that is by the by, for there is a deeper-going objection to it, to-wit, it had no place in the case under the facts of the record. The case hinging on the giving of timely notice by the master to the servant, what have the dangers, ordinarily incident to that form of employment or to the appliances they used, to do with the case? *Is a failure to give notice* (the presiding fact in the case) an *ordinary* incident the risk of which the servant assumed? Would not the jury so interpret such rule falling from the lips of the judge and decisive of the whole case, as this one is? If so, then the servant assumes the risk of the master's negligence in a situation sprung suddenly and imperiously demanding the instant use of care and caution. Much of what is said in considering instruction number four is applicable here. The natural result of that instruction was to confuse and mislead the jury, hence the order for a new trial may stand on the error of giving it.

(d) Speaking to defendant's instruction number seven, we say this: Plaintiff in his own quoted instruction put to the jury the issue of his due care. In that view of it, we need not seek for any real ground upon which to put the issue of contributory negligence to the jury as an affirmative defense, for by invoking the judgment of the jury on his due care he thereby invoked their judgment on his lack of it and that, in turn, spells

contributory negligence. But we do not approve the form of that instruction. We eye it askance as a daring and anxious novelty that disturbs more than it benefits. It would have been better to have said that plaintiff was required to use due care in doing his work and then gone on and defined, in the accepted language of the law what due care was, instead of using the formidable words: "was bound to use his *senses and intelligence and experience*." What does that sweeping and sounding aggregation of words mean, even to a lawyer or judge? They swell by contemplation and broaden by analysis. What did the plain men in the box understand, either taken in the aggregate or severally, by them? They smack much of argument by overpressing the matter; and in trying to assign a meaning to such all-embracing terms as "senses," "intelligence," "experience" might not the jury be led astray, and their native hue of common-sense (the immediate jewel of an ordinary juryman's mind) become "sicklied o'er with the pale cast of thought," or lost in a fog? We fear so—nay, we think so. Those words do not form part and parcel of the mild, simple and colorless definition of due care the law delights in. The beaten way is the best way and the safe way.

The conclusions reached make it unnecessary to consider the question sprung by plaintiff, to-wit, that the order granting a new trial was within the discretionary power of the court relating to granting one when the verdict is against the weight of the evidence. In the face of another trial we prefer not to comment on that feature.

It follows from what has been said that the judgment should be affirmed and the cause remanded for the new trial granted below. Let it be so ordered. All concur.

**J. C. RUSS, Appellant, v. THOMAS B. SIMS.****Division One, July 14, 1914.**

1. **SWAMP LANDS: History of Acts.** The various acts of Congress and of the General Assembly concerning swamp lands, and especially those affecting titles to such lands in the ten counties in southeast Missouri, and more especially in the counties of Cape Girardeau, Dunklin, Mississippi, New Madrid and Pemiscot, are traced step by step in the opinion; and as incident thereto the wandering habitat of the "Register's Book" and the "Receiver's Book" in Pemiscot county and the development of Carleton's Abstracts are explained—except that this history does not include the acts permitting Pemiscot, Dunklin and other southeastern counties to donate swamp lands to railroad, toll road, plank road and other corporations.
2. ———: **Title Passed to State: Delay in Patents.** The Act of Congress of September 28, 1850, was a grant to the State of Missouri of the unsold swamp lands lying within its boundaries, and any delay in the issuance of patents to the State or the selection of the swamp lands falling within the designations, did not defeat or impair the title of either the State or its grantees.
3. ———: **Delay in Patents: Consequent Confusion.** In many cases neither the State nor the county had patents to swamp lands in the ten counties of southeast Missouri prior to 1870, although for fifteen years prior thereto such lands were being sold by the counties under authority of statutes, the money paid, triplicate receipts issued by the designated county officers, and entry of such sale and the name of the entryman made in the Receiver's Book; and hence it was that title depended upon those receipts and books, and when the receipts were lost, or the county courthouse burned, wherein such books and duplicates of such receipts were, by statutes pertaining to the counties of Cape Girardeau, Dunklin, Mississippi, New Madrid and Pemiscot, required to be kept, great confusion in titles to many tracts resulted, since, after they were sold and paid for and no patents were issued, the county subsequently sold them a second time.
4. ———: **Equitable Title: No Patent.** A purchaser of swamp land who complied with all the requirements of the law relating to the sale of such land (paid the purchase price and received regular receipts of the receiver and register), acquired

the equitable title, although, through some fault of the State or county, he received no patent therefor.

5. ———: ———: Notice. The Register's Book and Receiver's Book, showing that certain swamp land has been entered and paid for by a certain entryman, if kept in the manner required by the various statutes relating to such lands, are notice to the world that the county has sold the land; and a subsequent purchaser from the county purchases subject to the rights of such former purchaser and his grantees.
6. ———: ———: Common Source. In a suit to quiet title, where all parties claim under a common source, it is of no consequence whether such common source was the owner of the legal or of a mere equitable title.
7. ———: Evidence: Carleton's Abstracts: Original. If Carleton's Abstracts of swamp lands in Pemiscot county is admissible as evidence of title under either act of the Legislature pertaining thereto (Laws 1901, p. 251, or Laws 1907, p. 271), then the original Receiver's Book and Register's Book from which they were made, though for some years not in the courthouse or the possession of the county clerk, are also admissible.
8. ———: Tax Suit: After Sale by Owner. A judgment for taxes against the original equitable owner of swamp land and a sale thereunder, begun and made long after he had by recorded deed conveyed the land to another, conveyed no title to the purchaser at the tax sale.
9. ———: Tax Sale: At No Term of Court. The Supreme Court takes judicial notice of the terms of the circuit court, and knows that the terms of said court in Pemiscot county in 1879 began on the "second Monday of March and September," and therefore a tax deed reciting that the land was sold "at the November term, 1879, of said court" is void on its face.
10. ———: Limitations: Estoppel. Where the evidence shows the lands were wild swamp land, covered with timber, uncultivated and in the possession of no one, neither the defense of limitations nor of estoppel is available.

Appeal from the Ste. Genevieve Circuit Court.—*Hon. Charles A. Killian*, Judge.

REVERSED.

*J. R. Brewer and Arthur L. Oliver* for appellant.

(1) This being a suit under Sec. 2535, R. S. 1909, with a common source of title proven, the court is

limited to the respective claims of title, between plaintiff and defendant. *Graton v. Halliday Lbr. Co.*, 189 Mo. 322; *Gage v. Cantrell*, 191 Mo. 705; *Machine Wks. v. Bowers*, 200 Mo. 219; *Dixon v. Hunter*, 204 Mo. 390. James B. Easley, the record owner of the land, was never sued. His father, who had owned the land up to April, 1873, was sued for the taxes thereon in 1879. (2) Defendant Sims has absolutely no title to the land in question because in 1871 the terms of the circuit court in Pemiscot county were fixed to begin on the "Second Monday of March and September." There could have been no November term of court in Pemiscot county, nor was there any. The law then, as now, required all such sales to be made during a term of the circuit court. Secs. 2380, 6838, R. S. 1879. (3) Since the tax deed under which defendant Sims claims title is void, his plea of estoppel and laches are of no avail, for the following reasons: (a) Because no possession of the lands in controversy was ever held by defendant Sims, or by anyone under whom he claims. (b) No improvements have been made on the lands in dispute by respondent or by anyone under whom he claims. Under these conditions the nonpayment of taxes by plaintiff, or those under whom he claims, is not laches, nor is it sufficient in this case to estop him. *Swearingen v. St. Louis*, 151 Mo. 361; *Haarstick v. Gabriel*, 200 Mo. 237; *Lumber Co. v. McCabe*, 220 Mo. 178; *Chapman v. Templeton*, 53 Mo. 463; *Cashman v. Cashman*, 123 Mo. 649; *Bollinger v. Chauteau*, 20 Mo. 89; *Brown v. Bacquin*, 57 Ark. 97; *Raymond v. Monsen*, 59 Iowa, 371; *Whitman v. Show*, 166 Mass. 451, *Cook v. Rounds*, 60 Mich. 310.

*Hope, Green & Seibert* for respondent.

(1) There was no competent testimony in this case showing that William G. Easley, under whom plaintiff claimed title, had ever acquired any title

whatever to this land from Pemiscot county. The entries in the alleged Receiver's Book were incompetent testimony in this case. 1 Greenleaf on Evidence (16 Ed.), sec. 485, p. 632; Starkie on Evidence, secs. 202, 315; 3 Wigmore on Evidence, sec. 2158, p. 2926; 3 Wigmore on Evidence, sec. 1632, p. 1979. (2) But on the theory that William G. Easley got title from the county, the trial court correctly held that if William G. Easley had ever attempted to convey the land in controversy to James B. Easley, then such conveyance was not admissible to record in the office of the recorder of deeds of Pemiscot county, because acknowledged before a justice of the peace of the State of Tennessee, and even if it was recorded therein, the record thereof imparted no notice to subsequent purchasers, and, therefore, under the law the title to said land passed to Virgil P. Adams by the sheriff's sale under the judgment for taxes against said William G. Easley, and the sheriff's deed offered in evidence by plaintiff. *Cowell v. Gray*, 85 Mo. 169; *Campbell v. Johnson*, 44 Mo. 247; *Gatewood v. House*, 65 Mo. 663; 2 *Devlin on Deeds*, secs. 1010, 1013; *Dickers v. Barnes*, 79 N. C. 490; *Muldorn v. Deline*, 135 N. Y. 150; *Hinchey v. Nicholls*, 72 N. C. 66; *Capps v. Holt*, 5 Jones's Eq. 153; *Fuller v. Fullows*, 30 Ark. 657; *Harkness v. Devine*, 73 Tex. 628; *George v. Bates*, 90 Va. 839; *Perry v. Price*, 1 Mo. 553; *Tiedeman on Real Property*, sec. 776; *Lionberger v. Baker*, 88 Mo. 447. (3) Proof of long payment of taxes by the respondent Sims, together with the laches proven on the part of the plaintiff, and the Easleys under whom plaintiff claims, were such as to bar the plaintiff from recovery herein by virtue of the equitable doctrines of laches and estoppel. 1 *Pomeroy's Eq. Jur.* (3 Ed.), secs. 418, 419; *Morrison v. Turnbaugh*, 196 Mo. 447; *Dexter v. McDonald*, 196 Mo. 400; *Underwood v. Dugan*, 139 U. S. 380; *Moran v. Horsky*, 178 U. S. 205.

WOODSON, P. J.—This suit was instituted in the circuit court of Pemiscot county, by the plaintiff against the defendant, to quiet the title to two hundred and forty acres of land, situated in that county, under old section 650, Revised Statutes 1899, now section 2535, Revised Statutes 1909, particularly described as follows: the northwest quarter of section eight, and the north half of the northeast quarter of section eighteen, all in township seventeen, north, of range eleven east.

On change of venue the cause was transferred to the circuit court of Ste. Genevieve county, where the cause was tried May 2, 1908, and taken under advisement. Pending the submission, over the objection of plaintiff, the court re-opened the cause, and after one year permitted the introduction of other evidence, and on May 1, 1909, rendered judgment for the defendant.

The plaintiff based his right to a recovery upon equitable grounds, as follows:

That while the legal title to the lands in controversy (swamp land) had never emanated from Pemiscot county, yet the equitable title had so passed by virtue of certain receipts from the receiver of lands of that county showing that William G. Easley had purchased the same, according to law, on September 12, 1858.

The plaintiff claims title to the land through said Wm. G. Easley, by reason of the following deeds of conveyances:

(a) Pemiscot county to William G. Easley, certificate of entry No. 987, dated July 17, 1858, consideration \$800, recorded in Register's Book No. 1, at page 35. Lands conveyed: Northeast quarter of section No. 8, township No. 17 north, range No. 11, east, and other lands.



(b) A quitclaim deed from William G. Easley and wife to James B. Easley, dated April 13, 1873, and duly recorded on the following day.

(c) Quitclaim deeds from the heirs of James B. Easley to plaintiff, bearing different dates in the year 1906, duly recorded.

The defendant's title is deraigned through the following deeds:

(1) A sheriff's tax deed to Virg P. Adams, dated March 10, 1880, purporting to convey the interest of William G. Easley to the land in controversy.

(2) A quitclaim deed from Virg P. Adams to Benjamin F. Barcroft, dated September 29, 1885, and recorded November 19, 1885.

(3) A mortgage deed from Benjamin F. Barcroft to T. B. Sims, the respondent, dated September 15, 1881, and duly recorded, date not given.

(4) Mortgagee's deed from T. B. Sims, mortgagee, to T. B. Sims, the respondent, dated December 14, 1887, all of which purported to convey the land in controversy, except that described in the sheriff's deed, which will receive further consideration later.

The defendant testified that he did not claim any title to the land in controversy, except as above stated. For some reason, not made clear, counsel for respondent seem to have objected to the introduction of various receipts and entries offered from a book called the "Receiver's Book," in the possession of one J. R. Brewer, one of the counsel for appellants, regarding the entry of the land and payment of the purchase price thereof to the receiver of swamp lands in that county, by William G. Easley, in the year 1858; but, when we come to consider the evidence of respondent regarding the same matters, we find that they rely upon the same papers or receipts, which, however, are found in Carleton's Abstract, which are copies of the same Receiver's Book previously mentioned.

The court found for the defendant, and rendered judgment accordingly, and the plaintiff duly appealed the cause to this court. Such additional facts, as may be necessary to illuminate the legal propositions involved, will be stated in connection therewith.

I. The first proposition presented for determination is the action of the court in admitting in evidence the original Register's Books etc., of Pemiscot county.

**Historical  
Development  
of Swamp  
Land Laws.**

It is somewhat difficult to understand the law governing Carleton's Abstract, without knowing something of the history of the swamp land legislation of Southeast Missouri; and for that reason, as well as to throw some light upon the swamp land titles of that section of the State, and the legislation governing the same, I here present a very carefully prepared history of the laws regarding those subjects.

It is fundamental that originally the United States held title to all lands now designated in the legal and political history of this State by the name of "swamp lands." There was passed and approved on September 28, 1850, by the Congress of the United States an act entitled, "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits." [9 U. S. Stat. at Large, p. 519.] The express intent of the above act, as set out therein, was that these lands should be given to the State of Arkansas and, as by another section of said act provided, to each of the other States of the Union, for the purpose of constructing necessary levees and drains to reclaim such swamp and overflowed lands as were wet and unfit for cultivation, inferably in their then state. The act applied only to such swamp lands as then remained unsold by the Federal Government. It was made the duty of the Secretary of the Interior, by sec-

tion 2 of such act, to make out correct lists and plats of such swamp lands and cause a patent to the State to be issued therefor. By section 4 of such act, as foreshadowed above, its provisions were extended to each of the other States of the Union in which swamp and overflowed lands might be situated. The effect of this grant, which by its terms was a grant *in praesenti*, was to pass title to the State to such lands as fell within the above definition. It is not necessary here, or to the point in hand, to inquire into the details, or into the effect of this grant. It has been held, however, that the issuance of the patents therefor to the State, or any delay in the issuance thereof, or in the selection as swamp lands of the lands falling within the definition, did not defeat or impair the title of the State or that of the State's grantees. The State and her grantees might be embarrassed in the assertion of their rights, in that, proof *aliunde* as to the condition of the lands in question might be made necessary, that is, as to whether in fact the lands were swamp and overflowed or not, but no other consequences would follow. [Irwin v. San Fran. Sav. Union, 136 U. S. 578; Wright v. Roseberry, 121 U. S. 488; Tubbs v. Wilhoit, 138 U. S. 134.]

Difficulties very naturally ensued, in that it was found that after the State authorities in pursuance of law and instructions to this end, had selected and duly reported to the proper departments at Washington such swamp and overflowed lands, many tracts thereof were found to be occupied by squatters claiming title, or claiming pre-emption rights therein. The Commissioner of the General Land Office had, it seems, opened such lands to contest and litigation, and upon *ex parte* testimony large areas thereof were being stricken from the swamp land list, thus depriving the State of Missouri and the several counties in which these lands lay, of their just portions thereof. A joint resolution was passed by the General Assembly of Mis-

souri calling attention to this difficulty and requesting some legislation in amendment of the situation. [Laws 1855, p. 534.] Thereafter Congress passed an act supplementary to the act of September 28, 1850. This act was passed March 3, 1857 (11 U. S. Stat. at Large, p. 251), and among other things not pertinent, it confirmed to the several States the swamp lands therein and theretofore by the act of September 28, 1850, granted to the States "and reported to the Commissioner of the General Land Office so far as the same shall remain vacant and unappropriated and not interfered with by an actual settlement under any existing law of the United States." It further required such selection of swamp lands to be patented to the several States in conformity to the revisions of the act as soon as practicable. Thus stands the legal history of this swamp land grant to the State.

These swamp lands were reported by the Government surveyors engaged in sectionizing the public domain to be such, and in the course of many years patents were issued to the State from time to time for this land. This work of issuing these patents and thus confirming the swamp land selections made, continued in a desultory way for more than twenty years. From this arises some of the peculiar and otherwise inexplicable methods with which the State and counties subsequently dealt with these lands.

The 16th General Assembly of Missouri met some three months subsequent to the passage of the swamp land grant by the Congress and forthwith began legislating on the subject of swamp lands. The first act passed in point of time, had reference solely to the southeastern group of Missouri counties, which embraced New Madrid, Mississippi, Scott, Cape Girardeau, Stoddard, Dunklin, Ripley, Butler, Wayne, and after February 19, 1851, Pemiscot. The act was entitled, "An act to provide for the reclamation and sale of overflowed and swamp lands in the southeastern

portion of this State," and was approved February 13, 1851. [Laws 1851, p. 232.] It will be noted that Pemiscot county is not by name mentioned in said act. This for the reason that at this time Pemiscot county was a part of New Madrid county, not having then been organized. It was organized six days later, however, that is to say, on February 19, 1851. [Laws 1851, p. 190.]

This first act provided for certain commissioners to be known as the "Board of Swamp Land Commissioners," whose duties it was to devise some plan of reclamation and carry the same into effect. The sum of fifty thousand dollars was appropriated for the use of this board. Pursuant to this act a land office was established at Benton, in Scott county, where, it was provided by such act, all of the swamp lands in each of the counties of said southeastern group should be sold. The lands were to be sold for not less than \$1.25 an acre. This sale was to be a public one and at the end thereof all such swamp land as remained unsold was to be subject to private entry at the same price. The money arising from the sale of said land was to be paid into the treasury of the State to the credit of a fund to be known as the "Swamp Land Fund." This fund was to be used in re-payment to the State of the appropriation of fifty thousand dollars. No provision was made by this act for the disposal of any surplus from the sales of this land. By the provisions of this act whenever any land was paid for in full by the purchaser thereof at any sale, duplicate receipts were to be made, of which one was given to the purchaser and the other was to be certified to the Secretary of State. Upon receipt of such duplicate by the Secretary of State it was the duty of the Governor to issue a patent for such land to such purchaser.

There was passed by this same 16th General Assembly a few days subsequent to the passage of the above act, that is to say on March 3, 1851, another act

applying to all of the other counties in the State except Butler, Cape Girardeau, Dunklin, Mississippi, New Madrid, Pemiscot, Ripley, Scott, Stoddard and Wayne, which we may call for convenience the "southeastern group." The act last above mentioned was entitled: "An act donating certain swamp and overflowed lands to the counties in which they lie." [Laws 1851, p. 238.] This act recited in the first section thereof that "in order to provide for the reclamation of all overflowed and swamp lands which were granted to the State of Missouri, for that purpose, by an act of the last session of the Congress . . . all said lands in this State are hereby donated to the counties in which said lands respectively may be situated." As stated, the southeastern group was by this same section expressly excepted. The county court of said several counties, except the southeastern group, was by virtue of said act authorized to order the sheriff to sell said lands in such quantities, at such time and place and on such terms as such court may think proper. Upon the making of full payment for any of said lands, this act provided that a patent therefor should be signed by the Governor and countersigned by the Secretary of State. The net proceeds of all such lands, after paying the expenses of drainage, reclaiming, surveying and selling the same, *were to be paid into the county treasury and become a part of the common school fund of the given county in which the land lay.* The Governor of the State was required by this act, as soon as he should receive from the Government of the United States lists and plats of such lands, to transmit copies thereof to the several county courts wherein such swamp lands might lie. This act specifically mentions and excepts Pemiscot county, having been approved twelve days after the erection and organization of said county.

So remained the status as to title of these swamp lands so far as the southeastern group is concerned till the meeting of the 17th General Assembly. This Legislature passed an act approved February 23, 1853, entitled simply, "An act donating swamp lands to the several counties in which they lie." [Laws 1852-3, p. 108.] This act applied only to the above-named ten counties in the southeastern group. The first section of said act donated these swamp lands to the counties in the southeastern group upon the same terms and provisions of the act of March 3, 1851, *supra*, applying to all the other counties in the State. But it was required that such southeastern group should refund to the State the fifty thousand dollars by the State appropriated for the use of the Board of Swamp Land Commissioners in the drainage and reclamation of the swamp lands in such group. It was also provided that the counties in said southeastern group should be entitled to their proportion of the money due to the State of Missouri from the United States on account of swamp lands erroneously sold by the United States, or taken by squatters under pre-emption claims, between September 28, 1850, and March 3, 1857. This also abolishes the Board of Swamp Land Commissioners of the southeastern group which had been created by the act of February 13, 1851. This act had the effect in a very crude and inartificial sort of way, of placing the drainage and reclamation of the swamp lands in the hands of the county courts of the counties, in the said southeastern group. It will be noted now that as to the manner of reclamation; as to the officers who were to have charge of such reclamation; as to the sale of such lands and as to the ultimate resting place of the net proceeds arising therefrom (to-wit, into the several school funds of the several counties of such group), and as to the person who should issue patents thereto (to-wit, the Governor of Missouri), all of the counties in the State having

swamp lands stood upon a parity. In effect, by section 9 of this act it was provided that such lands might be sold for not less than one dollar per acre. We say in effect, because it will be noted that this section does not provide for the sale of land, but for scrip, which was locally known as "swamp land scrip." This scrip was issued to those who might do the work of drainage and reclamation, or, perhaps at times, for cash to be expended upon such work, and later on, at the will of the holder of such scrip or of his assignees, it was "located," as it was locally called, by selecting from the list of the local register of lands those certain swamp lands which the "locator" desired to buy. Afterwards such swamp land scrip was turned in to the receiver of public moneys of the local land office, who thereupon issued a *certificate of entry*, locally so-called, but in fact and reality a receipt in triplicate, to the holder of the scrip who was the purchaser of the land. This receipt, or certificate of entry, entitled the purchaser to a patent, as we shall see more in detail later.

The 18th General Assembly passed an act amending the act of February 13, 1851, by repealing so much of the same as required the counties of the southeastern group to refund to the State the proportion each of them had received of the fifty thousand dollars heretofore mentioned. [Laws 1854-5, p. 160.]

This same General Assembly passed an act on the 28th of February, 1855, which contained but one section. This act was entitled, "An act amendatory of an act 'donating certain swamp and overflowed lands to the counties in which they lie,' approved March 3, 1851." [Laws 1854-5, p. 160.] This one-section act was in full, enacting clause omitted, as follows:

"That the several county courts of this State are hereby authorized to sell and dispose of the swamp and overflowed lands within their respective counties, either with or without draining and reclaiming the



same, as in their discretion they may think most conducive to the interests of such county. This act to be in force from its passage."

On the next day following the passage of the act last above set out the most important act, so far as concerns the counties in the southeastern group, was passed. This act was entitled, "An act in relation to swamp lands in the counties of New Madrid, Pemiscot, Mississippi, Scott, Cape Girardeau, Stoddard, Wayne, Ripley, Butler and Dunklin." [Laws 1854-5, p. 154.] This act contained a group within a group in this, that a subgroup consisting of Scott, Dunklin and Pemiscot counties was erected in the said southeastern group, and certain small differences in administration and administrative offices was provided for this subgroup. This will be hereafter referred to, as well as another small difference in this act which latter variation affected Pemiscot county alone.

Section one of the above act provided that the clerks of the county courts of all the counties in the southeastern group (except in Scott, Dunklin and Pemiscot counties) should be *ex-officio* registers of lands within their several counties; section two provided that the treasurers of the above named counties, again except Scott, Dunklin and Pemiscot, should be *ex-officio* receivers of public moneys arising from the proceeds of the sale of swamp lands situated in said several counties. In the counties of Scott, Dunklin and Pemiscot such registers of swamp lands and receivers of public money arising from the sale of such lands, were to be elected; otherwise, the duties of all such registers and receivers of lands in the southeastern group were similar, according to the provisions of this act. Section 3 of said act provided for the giving of bonds, both by the receiver and register of swamp lands, conditioned that such officers "shall perform all the duties required of them by law, and account for all money, books and papers which may come into their

possession, at such times and places as may be required by law, and at the expiration of their term of office deliver to their successors respectively, all moneys, *books and papers* that may belong to, their respective offices." Section four of said act provided that upon the sale of any swamp land the register of lands should "make triplicate certificates of the fact, describing the land so sold by its numbers and quantity, to whom sold and the amount of the purchase money per acre, and in the aggregate," and that he should deliver one of such certificates to the purchaser, file one in his office and transmit the other to the register of lands at Jefferson City, together with an abstract containing the numbers of the land, the number of the certificate, the name of the purchaser and the amount of the purchase money. Upon the presentation of the purchaser's original of this certificate of purchase issued in triplicate by the register to the receiver of public moneys such receiver was required to issue triplicate receipts to the purchaser containing the same information as contained in the certificate of purchase issued by the register as aforesaid, and evidencing the payment of the money or the equivalent thereof, in scrip, as paid by the purchaser. One of such receipts, it was provided, should be delivered to the purchaser, one was to be filed in the receiver's office and the other transmitted to the register of lands at Jefferson City, together with an abstract, giving such the identical information which was required to be given by the register's abstract of purchase. Upon the receipt of such certificate, receipts and abstract by the register of lands at Jefferson City, and upon his comparing the same and ascertaining that they were correct, it became the duty of the Governor to cause to be issued a patent to the purchaser of such land. This act also provided, in section 19 thereof, for the survey by the counties, through their county courts, of all swamp lands in such counties which had not

theretofore been surveyed by the authority of the United States, and for the filing of one copy of the surveyor's plats and field notes in the office of the county register of lands, and one copy thereof with the State Register of Lands. This was later changed, by a local act as to Pemiscot county (Laws 1856, p. 473), by requiring these latter plats and field notes to be filed with the Secretary of State.

The county courts of the several counties were empowered, upon the giving of ninety days notice by the sheriff of the time and place of sale and of the lands to be sold, to cause said lands to be offered for sale, which sale it was provided, was to be conducted by the register of lands. The highest bidder at the public auction so held became the purchaser. The lands remaining unsold were thereafter subject to private entry with the register and receiver, as in the manner heretofore pointed out. The minimum price, it was provided by section 18 of said act, whether sold at public sale or private sale should be the sum of one dollar per acre. No provision was made in this act for the disposition of the surplus money, if any should be left after draining and reclaiming these lands.

By section 29 of said act, it was specially provided that as to Pemiscot county all contracts made therein and executed in good faith, prior to March, 1855, and all contracts not executed and entered into prior to April, 1855, and having relation to swamp lands in that county, should be held to be legal. This special provision seems to be explainable only by a matter of local history, which is, that contracts under previous laws had prior thereto been made by the county court of Pemiscot county for the construction of a levee along the west shore of the Mississippi river and on the east side of Pemiscot county, to prevent floods from the waters of said river. These contracts for building levees, it seems, had in many cases been fully executed and in many other cases were being then

carried on. These contractors were being paid for the most part, if not wholly, in swamp land scrip, which they or their assignees "located" upon such parcels of swamp land as they desired to purchase, from the register of lands and the receiver of public moneys of that county.

By the act of November 23, 1855 (Laws of 1855, p. 351), which also seemingly applies only to the southeastern group, certain provisions were made, more nearly defining the rights of pre-emption, which right was specifically conferred by the act of March 1, 1855, *supra*. This act also provided that in all counties wherein registers and receivers were required to be elected, such officers should hold their office for the term of two years, and that vacancies should be filled by appointment of the county courts, except in Mississippi county, wherein the Governor was given the right to appoint such register and receiver. This act is a very fine example of the manner in which legislation upon the subject of swamp lands was rendered ambiguous, doubtful, complicated, tangled and irreconcilable.

It may be noted as important upon the question of the deraignment of a swamp land title, that chapter 93, entitled "Swamp and Overflowed Lands" (R. S. 1855, p. 1005), did not apply to such southeastern group and therefore did not apply to Pemiscot county, for section 20 thereof expressly exempts the counties of the southeastern group from the provisions of chapter 93.

The 19th General Assembly passed an act on the 27th of February, 1857 (Laws 1856-7, p. 271), entitled simply, "An act in relation to the disposal of swamp lands," which again subdivided the law touching swamp lands in the southeastern group, by providing that whenever the county courts of either of the counties of Cape Girardeau, Dunklin, Mississippi, New Madrid and Pemiscot should be satisfied that full pay-

ment had been made according to the terms of sale for any of the lands sold as swamp lands under any of the acts of the General Assembly of this State authorizing such sale, they should cause to be issued to the purchaser, his heirs or assigns a patent for the same. This patent was to be issued in the name of the State under the seal of the county court of the county issuing it, and to be signed by the president of the county court, and attested by the clerk thereof, and should grant and convey to the grantee therein named all the right, title and interest that the county had acquired to the land therein described under the several acts of Congress and of the General Assembly of this State. By a further section of this act it was made the duty of the Governor to furnish to each of such counties a list of all the swamp lands therein, which list was required to be filed in the office of the county clerks of such counties, and was to become a public record, and a copy thereof, it was provided, was to be received as prima-facie evidence of title in such county, to such, in all courts and places in this State. It was further provided that said act should be a public act and be in force from and after its passage. The effect of this enactment was to take these five counties named above out of the southeastern group so far as concerns the manner of issuing a patent to the swamp lands therein.

This act explains and throws full light upon an act passed on the 4th day of November, 1857, following. [Laws (Adj.) 1857, p. 269.] Read in the light of the act next before mentioned, and which gave power to the county courts to issue patents to swamp lands in said five counties, the act last mentioned seems more reasonable than it would otherwise at first blush appear. This last mentioned act was entitled, "An act supplementary to an act entitled 'An act in relation to the disposal of swamp lands in the counties of Cape Girardeau, Dunklin, Mississippi, New Madrid and

Pemiscot, approved February 27, 1857.' " The first and only section of the latter act provided, in full, enacting clause omitted, as follows:

"Section 1. That the *Secretary of State is hereby required to return by due course of mail, all the certificates of entry and payment of and for said lands,* to the respective county courts named in said act, and that the county courts of the respective counties so named shall have the entire control of the matters contemplated in said act, any law to the contrary notwithstanding. This act to be in force from and after its passage. Approved November 4, 1857." (Italics ours.)

The act to which the section last above was expressed to be an amendment, declared itself to be a public act.

The act above set out has been productive of practically all the trouble and legal difficulty which have arisen in the five counties of the southeastern group, particularly and specifically mentioned in this act. Many of these counties have lost their records by fire or by war, in which catastrophes the duplicate certificate of purchase kept on file by the register of lands and the duplicate receipts for the purchase money kept on file by the receiver of public moneys, as well as the triplicate of the certificates of purchase and receipts formerly in the hands of the State Register of Lands, and returned by him pursuant to the act of November 4, 1857, were all wiped out of existence; leaving no original records except a little slip of paper held by the original purchaser. When the latter was lost and the records burned or destroyed by war, as either partially or wholly transpired in Pemiscot and other counties, the entire transaction was wiped out of existence, so far as any paper records thereof were concerned.

If it be asked why patents were not issued by the several counties of this State upon the filing at Jeffer-

son City with the Register of Lands of the triplicate certificates of purchase and the triplicate receipts for the payment of the purchase money, the answer is, that for more than twenty years the slow matter of selling these swamp lands and the matter of issuing patents to the State by the United States therefor, were dragging along without being fully accomplished. The lands were being surveyed and patents were being issued therefor all these years. Likewise and on account of delays in surveying and consequent selection of the lands as swamp lands and on account of the Civil War, the State of Missouri did not issue these patents to the several counties in which these lands lay for the most part until subsequent to the year 1870, and from 1870 down, in many cases to a much later period, these patents were made to the State and by the State to the several counties from time to time. Practically none of them, if any at all, were issued promptly. The delay on the part of the State authorities was due to the delay in the selection of this land by the Interior Department and to the delay of the United States Government to issue patents for the State therefor. Hence it was that the title to many hundreds of tracts of these lands depended from 1855 solely on these receipts to the purchasers from the office of the receiver of public moneys. In a great number of cases neither the State nor the county had patents therefor till subsequent to the year 1870. What is said touching delays in issuing patents applies to the conditions only in the southeastern group.

Another act affecting the swamp lands in the State was passed by this same 19th General Assembly. This act was entitled "An Act Amendatory of an act entitled 'An Act donating swamp and overflow lands to the counties in which they lie,' approved December 13, 1855." [Laws 1857, p. 32.] The above act contained but two short sections, the first of which provided that all swamp lands which have been or may

hereafter be patented to the State "*be and the same are hereby declared to vest in full title, and belong to the counties in which they may lie.*" The second section merely provided that the act should take effect and be in force from and after its passage, any law to the contrary notwithstanding.

Following this no other act of importance, so far as the title to this land is concerned, was passed by the Legislature until the acts respectively of March 27, 1868 (Laws 1868, p. 68) and the Act of March 10, 1869 (Laws 1869, p. 66). A combination of these two acts carried into the subsequent revisions have come down to us as the law of to-day in all the counties in the State touching these lands. Some minor amendments have been made, but they are of comparatively recent date and affect only a limited portion of the lands in the southeastern group.

The act of March 27, 1868, *supra*, was entitled simply, "An Act in relation to swamp and overflowed lands." It put the control of such lands, as well as the matter of issuing patents therefor, wholly into the hands of the several county courts of the counties of the State; it provided that none of said lands should be sold for less than \$1.25 per acre within five years from the first day of January, 1866; it provided that the State Register of Lands should issue a patent to all lands which had been sold by the several county courts in their respective counties since the fourth day of November, 1857, upon such State Register of Lands being furnished by the various county courts an abstract of all the sales of such lands made subsequent to the period aforesaid. Just here it may as well be said that by section 6 of the later act above referred to, that of March 10, 1869, the matter of issuing patents to swamp lands was taken from the Register of Lands, and put into the hands of the county courts wholly, where it has ever since remained. It will be noted, however, that as to Pemiscot, Cape



Girardeau, Dunklin, Mississippi and New Madrid counties, the authority in their several county courts to issue patents to swamp lands already inhered and had existed continuously from and pursuant to the act of February 27, 1857. [Laws 1856, p. 271 et seq.] Such patents had not been so issued in the great majority of cases by reason of the vicissitudes of war and because of the delay in selection of these lands as swamp, the delay in issuing patents from them to the State, and the delay in issuing patents by the State to these counties. The lands were regarded for the most part in those days as being utterly worthless, and trouble or money expended for a patent, even if the other reasons suggested had intervened, was an unnecessary toil and a useless expense. At any rate, *no such patents for untold thousands of acres of this land were issued*, which, regardless of the good reason or any reason for the omission, make out a condition to be met, and explanations become valueless.

The proceeds of all such sales of swamp lands after paying the expenses of drainage, reclaiming, surveying and selling the same, were required to be paid into the county treasury and to become a part of the public school fund of the county in which the land lay. It was further provided that settlement should be made with the several counties for moneys paid by the General Government to the State on account of unauthorized sales by the United States of portions of these swamp lands, and on account of settlement by the United States pre-emptors.

The said act of March 10, 1869, *supra*, by the first section thereof, threw an illuminating light upon what has been said above touching the delay by the State to make the counties patents for these swamp lands. For it will be noted that it says, "In order to convey to the different counties in the State of Missouri a complete title to all the swamp and overflow lands, which were granted and have been patented to

the State of Missouri by an act of Congress . . . the Register of Lands is hereby directed to prepare a patent or patents, embracing all the swamp or overflow lands, lying within the limits of the several counties of this State, conveying thereby all title and interest of the State of Missouri in and to such lands to the counties in which such lands may lie." And which patents when prepared were required to be signed by the Governor, attested by the Secretary of State and recorded with the Register of Lands in his office. But for the reasons above suggested, it would otherwise seem queer that such patents had not theretofore been issued, for this act was passed, as stated, on March 10, 1869. It repealed all inconsistent acts and provisions, and when read in connection with the act of March, 1868, *supra*, has had the effect of practically crystallizing the statutory swamp land law of this State. Pursuant to the act of March 1, 1855 (Laws 1854-5, *supra*), the several registers of swamp lands and the several receivers of public moneys in the southeastern group, whether such officers were registers and receivers, respectively, *ex-officio*, as they were in some counties in this group, or whether they were elected, proceeded to make sales of these lands and to attend to their duties as required by said act. The lands being then held to be practically valueless, these sales were slow, except when reclamation scrip could be "located" on them. There were in many of these counties more than three hundred thousand acres of these swamp lands, embracing many thousands of different tracts, according to the smallest government subdivision. This fact made necessary the keeping of books, wherein there were set down the number of the swamp land scrip offered in payment for the land, the name of the purchaser of the land, the description of the land, the price thereof, the aggregate number of acres of such land purchased,

and the aggregate price paid therefor. This was a matter of absolute necessity, otherwise it would have been impossible to have performed any of the duties made incumbent upon these two officers in an intelligent way. These books, which were usually designated as the "Register's Book" and the "Receiver's Book," were kept in the offices of such officers and in the offices of the treasurer and county clerk; where these two latter officials were receivers and registers of swamp lands, *ex-officio*, respectively. When these officers—the receiver of public moneys and the register of swamp lands—were put legally out of office by the acts of 1868 and 1869, *supra*, their books and the records kept by them passed into the custody of the county clerks of the several counties of the southeastern group for the most part. It may be said in passing, as a matter of history, that the Civil War put these two offices and officers in practically all counties in the southeastern group, out of commission for a time, and that from the beginning of the Civil War until the passage of the acts of 1868 and 1869 above referred to abolishing their offices, none of them in fact performed any of the duties incumbent on them by statutes. In some of the counties, as for example, Pemiscot county, the books kept by these officials were saved from loss by war, almost by a miracle, only to pass for a long period by the catastrophe of fire, as an incident of the burning of the courthouse therein in 1882, into the hands of private persons and were by these private persons for many years retained.

The interesting details of the vicissitudes to which the "Register's Book" and the "Receiver's Book" of Pemiscot county, have been subjected is to be gathered in shreds and patches from the vast number of cases coming here from that county involving swamp land titles, and may be placed together into a fairly consistent history. When the courthouse of

that county was destroyed by fire in 1882, both the "Register's Book" and the "Receiver's Book" were temporarily out of the custody of the clerk of the county court. He had permitted Hon. George W. Carleton, a lawyer and abstractor, resident at Gayosa, the then county seat, to borrow and to take these books out of their usual custody, for a short time, in order that entries therefrom might be copied into Carleton's abstract. While the books were in the custody of Carleton, the courthouse, with all records of land titles, court records and records of whatever sort, was destroyed by fire. These books remained in Carleton's hands thereafter, almost forgotten, till his death, in 1893, when they passed to his heirs as if assets of his estate and were sold by the administrator or by his heirs, just as if they had been in fact Carleton's property. Subsequently, and in very recent years, the purchasers of the two books have again placed them in the custody of the county clerk of Pemiscot county.

Many special acts of the Legislature, passed throughout the years before the Constitution of 1875, permitting Pemiscot, Dunklin and other of the southeastern group to donate portions of the swamp lands therein to railroads, toll roads, plank roads and other corporations, have not been noticed. They are not pertinent to the matter now in hand. Likewise some special provisions affecting the minimum price at which swamp lands in Dunklin and counties other than Pemiscot could be sold, are passed over as not pertinent, till a swamp land title with this point of minimum price in it, shall come up from these counties. [See Act of Jan. 30, 1857, Laws 1856, p. 464.]

Such in brief is the history of swamp land legislation affecting the title to such lands in the southeastern group in general and in Pemiscot county, Dunklin county and Scott county more particularly.

After this historical diversion I return to the subject in hand. It will be seen that the Act of 1901, Laws

1901, page 251, known as the "Carleton Act," made the abstracts he had prepared from Register's and Receiver's books, prima-facie evidence of land titles in Pemiscot county. (That act, by the way, has been declared unconstitutional by this and the Federal courts, which rulings led to the enactment of the Act of 1907, Laws 1907, page 271, remedying the vice of the former act.)

It stands to reason, that if Carleton's Abstract was admissible in evidence under either of said acts, and counsel for respondent insists it was, then under and by virtue of the well-known rules of evidence the original books in the hands of Mr. Brewer, from which the abstract was made, were also admissible because they were the best evidence, the original being always the best.

We are, therefore, clearly of the opinion that the court did not err in admitting the original books.

We had occasion to review this law somewhat extensively in the case of Mosher v. Bacon, 229 Mo. 338, and there we considered the act of the Legislature creating the offices of the register and receiver of swamp lands, in the counties therein mentioned, their duties, the mode of selling those lands, and the books they were required to keep, and what they should show, etc. After so doing we held that when a purchaser had fully complied with all of the provisions of said laws, and paid the purchase price for the lands entered, and received the receipts of said officer therefor, as therein provided for, he thereby acquired the equitable title to the land so entered and paid for, notwithstanding, through the fault of the officers of the State or county, he never received a patent therefor as prescribed by the act; also, that the Register's and Receiver's books required to be kept by said act were notice to the world that the county had sold the lands shown thereby, and that if any

one subsequently purchased them again he did so at his peril.

It was also there held that said equitable title was superior to and better than the legal title subsequently acquired from the county. The law as announced in that case, is controlling in this. But the application of that principle of law to this is not absolutely necessary for appellants' right to recover here, because William G. Easley was the common source of title through whom both parties to this suit claim title, which forecloses all necessity to make inquiry into said Easley's title.

II. Counsel for appellant contends that the judgment of the circuit court should be reversed for

<b>Taxation Against Vendor.</b>	the reason that the record shows affirm- atively that the respondent has no title whatever to the land in controversy, for
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the reason that the tax judgment against William G. Easley, under which the respondent claims title, was rendered March 15, 1879; that the execution thereunder was issued September 8, 1879; that the execution was delivered to the sheriff September 10, 1879; that the sheriff's levy was made on the same day; and the sale thereunder of tract No. 2, the north half of the northeast quarter of section eighteen, township seventeen, range eleven, etc. (the remaining part of the land sued for was not sold) was made November 4, 1879.

The evidence also shows that the appellant derived his title through William G. Easley through mesne conveyance. He conveyed the land to his son, James B. Easley, by deed dated April 13, 1873, duly recorded April 14, 1873. This evidence shows that William G. Easley, the defendant in the tax suit, under which both the respondent and appellant claim title, had disposed of the land to his son James some six years before the tax suit was instituted, the judgment

rendered or sale made thereunder. That being true the judgment and the sale of the land thereunder were absolute nullities, in so far as James and those who claim through him are concerned.

This alone is sufficient to justify a reversal of the judgment of the circuit court.

But there is another equally valid reason why the judgment should be reversed, and that is, the deed shows that that part of the land which was sold was sold on November 4, 1879, at the November term of said court.

This court takes judicial notice of the terms of the various circuit courts of the State, as they are established by public statutes. From 1871 to a date subsequent to the date of this sale, the terms of the Pemiscot Circuit Court began on the "second Monday of March and September" of each year. From this it is seen that there was no such term as the November term of the circuit court of Pemiscot county in the year 1879, when the sale took place.

And sections 2380 and 6838, Revised Statutes 1879, the same as our present statutes, required all such sales to be made during the term of the circuit court.

It thus appearing that the sale did not take place during a term of the circuit court, it necessarily follows that the sale was also void on that account as this court has repeatedly held. But independent of the two defenses just mentioned, the record shows that the sheriff only sold the north half of the northeast quarter of section eighteen, township seventeen, range eleven, and did not pretend to sell the northeast quarter of section eight, township seventeen, range eleven.

Under this showing the respondent had no color of title whatever to this one hundred and sixty acres.

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III. Respondent also interposed the defenses of the Statute of Limitations, and estoppel.

After a careful reading of this entire record, which is not unusually long, we fail to find a scintilla of evidence preserved tending to support either of those defenses, but upon the other hand the evidence shows that the lands were wild, swamp-timber lands uncultivated and in the possession of no one.

Under these views of the case, we are of the opinion that the judgment of the circuit court should be reversed, and that a judgment should be here rendered in favor of appellant in accordance to the prayer of the petition.

It is so ordered. All concur.

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BRAINARD T. HILL et al., Appellants, v. ELLERY  
W. HILL et al.

Division Two, July 14, 1914.

1. **PARTITION: During Life Estate: Contrary to Will.** Where the will gave land to testator's son and his wife "during their natural lives and at the death of both to be divided equally between all my grandchildren; but should my son die before his wife the real estate is to be divided equally between my grandchildren and said daughter-in-law, share and share alike," the land cannot be partitioned during the lifetime of said son, even on his petition, the word "divided" indicating clearly that it was the testator's will that no sale or other disposition of the property be made during the life of the son. [Refusing to follow *Reinders v. Koppelman*, 68 Mo. 482; *Sikemeier v. Galvin*, 124 Mo. 367; and *Preston v. Brant*, 96 Mo. 552; and following the more recent cases of *Gullick v. Huntley*, 144 Mo. 1. c. 246, and *Stewart v. Jones*, 219 Mo. 614.]
2. —: **Divide: Definition.** The word "divide," when given its ordinary and usual significance, means to partition into severalty.
3. —: **Construing Will: Meaning of Terms.** In construing a will, courts derive but little assistance, in determining the



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meaning to be given the various terms and expressions used therein, from adjudicated cases. No two wills are precisely alike, and the conditions which surround testators differ so widely that conclusions reached in one case are rarely of great service as a guide in another.

Appeal from Lincoln Circuit Court.—*Hon. James D. Barnett*, Judge.

**AFFIRMED.**

*Avery, Young & Woolfolk* and *Frank Howell* for appellants.

(1) The court had jurisdiction of the subject-matter and of all the parties having any interest in the lands sought to be partitioned and under the laws of this State, the lands were subject to partition between the parties. *Sikemeier v. Galvin*, 124 Mo. 367; *McQueen v. Lilly*, 131 Mo. 9. (2) The estate in remainder may be partitioned during the life of the life tenant, and so also if the life tenant and anyone interested in the remainder join in a request for partition, the whole estate may be partitioned and sold or divided in kind. *Reinders v. Coppleman*, 68 Mo. 482; *Preston v. Brant*, 96 Mo. 552. (3) It is the policy of our law to make all real property freely alienable and available and to give to each owner the use and enjoyment of his part when it is possible without prejudice to others. *Donaldson v. Allen*, 182 Mo. 626. (4) The partition prayed for in this cause was not contrary to the provisions of the last will of William H. Hill. *Sikemeier v. Galvin*, 124 Mo. 367; *Godman v. Simmons*, 113 Mo. 122; *Thompson v. McClernon*, 142 Mo. App. 440; *Stewart v. Jones*, 219 Mo. 614.

*R. L. Sutton* and *Creech & Penn* for respondents.

(1) Partition of the property devised in this case is contrary to the intention of the testator, expressed

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in his will, and therefore violative of the imperative terms of the statute. Secs. 583, 2569, R. S. 1909; Gulick v. Huntley, 144 Mo. 250; Stewart v. Jones, 219 Mo. 614; Carter v. Long, 181 Mo. 709. (2) The intention of the testator is the soul of the will. Cox v. Jones, 229 Mo. 63.

BROWN, J.—Action for partition of real estate. From a judgment of the circuit court sustaining a demurrer to the plaintiffs' petition, they appeal.

On June 23, 1905, one William H. Hill devised his real estate to his son, daughter-in-law and grandchildren by the following will:

"I will and bequeath my real estate consisting of about two hundred acres one-fourth of a mile south-east of Troy in Lincoln County, Mo., to my son B. T. Hill and his wife Nettie during their natural lives and at the death of both to be divided equally between all of my grandchildren. But should my son B. T. Hill die before his wife, I devise that the real estate be divided equally between my grandchildren and daughter-in-law, Nettie, share and share alike. I give to my son B. T. Hill six hundred dollars, I give and bequeath to each of my grandchildren the sum of five hundred dollars, the share of her two children to be held in trust and managed by my daughter-in-law, Nettie, their mother, I hereby nominate, constitute and appoint my son B. T. Hill executor of this my last will and testament without bond."

The petition, to which a demurrer was sustained, contains a copy of the foregoing will and avers that the plaintiff Brainard T. Hill is the B. T. Hill referred to as a devisee in said will; that plaintiff Emma A. Hill is the wife of said Brainard T. Hill, and is designated in said will as "Nettie" Hill; that plaintiff Jessie W. Hill and the defendants are the grandchildren of William H. Hill the testator. Said testator died in 1905, and his will was duly probated.

Plaintiffs Brainard T. and his wife, Emma A. Hill, allege that, under the will of William H. Hill, they are the owners of a life estate in the land sought to be partitioned. That, owing to the large number of interests in the land so devised, such land cannot be equitably partitioned in kind between plaintiffs and defendants; wherefore plaintiffs pray that said land be sold and the value of the life estate of said Brainard T. and Emma A. Hill be paid to them out of the proceeds of such sale, and that the remainder of said proceeds, less the expenses of the sale, be distributed to the grandchildren of said William H. Hill, deceased.

The defendants, who are minors, through their curator demurred to said petition on the ground that it shows on its face that the lands described in the petition are not subject to partition.

It will thus be seen that the demurrer of defendants presents the issue that, under section 2569,

**Partition:  
Contrary  
to Will.** Revised Statutes 1909, the real estate described in the petition cannot be partitioned in kind or sold during the lifetime of plaintiff Brainard T. Hill without disregarding the intent of the testator, as expressed in his will.

It will be observed that the will makes two provisions under either of which the real estate devised may be divided. First, upon the death of both Brainard T. and his wife Emma A. Hill; and, second, upon the death of Brainard T. Hill while his wife is yet living. Neither of those parties have died, and the vital question before us is: Can the real estate so devised be partitioned or sold without disregarding the expressed wishes of the testator? The proper construction of the word *divided*, as used in the will now in judgment, must, in a large measure, determine the issue confronting us. Did the testator by directing that the real estate should be divided upon the death

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of Brainard T. Hill, or upon the death of both Brainard T. and his wife Emma A., express a desire that such real estate be not partitioned or sold until such death or deaths?

To sustain their contention that the real estate devised by William H. Hill may now be sold in partition while Brainard T. and Emma A. Hill are yet alive, plaintiffs' counsel cite, and rely extensively upon, *Reinders v. Koppelman*, 68 Mo. 482; *Sikemeier v. Galvin*, 124 Mo. 367; and *Preston v. Brant*, 96 Mo. 552. It is quite true that *Reinders v. Koppelman* does support the doctrine for which plaintiffs contend, but this court has declined to follow the rule announced in that case in two cases which subsequently came before it, as will presently appear.

*Reinders v. Koppelman*, *supra*, seems to have been decided when the technical rules of the common law were applied in the construction of deeds and wills with more vigor than at the present time.

In *Gullick v. Huntley*, 144 Mo. l. c. 246, it was ruled that a will conveying land to Mary Huntley "for life, and after her death to be divided equally, share and share alike" between the sons and daughters of her husband (the testator) could not be partitioned during the lifetime of said Mary Huntley. *Reinders v. Koppelman*, *Sikemeier v. Galvin* and *Preston v. Brant*, *supra*, were all considered at the time the last above noted announcement was made (144 Mo. l. c. 250), yet the doctrine of those cases was not followed.

In the more recent case of *Stewart v. Jones*, 219 Mo. 614, there was brought here for construction a will by which one Patrick Jones devised certain real estate to his widow for life, and directed that at her death it should be sold and the proceeds divided among certain remaindermen. In construing that will the present learned Chief Justice of this court, the members of Division One concurring, ruled that the land thus devised could not be sold during the life-

time of the widow of Patrick Jones, because such sale would contravene the intention of the testator. This ruling was made notwithstanding the fact that the widow of Jones had married and conveyed her life estate in the devised lands to another person and was no longer using such lands as a home. From the brief of respondent in that case we observe that *Sikemeier v. Galvin*, 124 Mo. 367, was cited, but not followed. While the three cases mainly relied upon by appellant may not have been expressly overruled, they have been intentionally disregarded in cases where they were cited and could have been followed. We hold they are not controlling authority in this State, in so far as they conflict with the conclusions announced in this case.

Counsel for plaintiffs have cited a multitude of authorities to sustain the proposition that real estate may be sold in partition, notwithstanding the existence of contingent remainders. That issue is not directly before us now. The right to partition in kind or to sell real estate contrary to the expressed wishes of a testator, through whom the plaintiffs derive title, is the only issue properly before us.

By directing that the land which he devised should be divided upon the death of Brainard T. Hill, or upon the death of both Brainard T. and his wife, William H. Hill expressed a desire that such real estate be not sold until one or the other of those contingencies arose.

The word *divide*, when given its ordinary and usual construction, means to partition into severalty. [Webster; 14 Cyc. 553.] Counsel for plaintiffs have cited us to many authorities which they claim tend by analogy to support their position, but we decline the task of reviewing the numerous authorities so cited. It is not our desire in this case to pad the reports with a thesis on the law of wills. Our purpose is to decide

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this case correctly, and in conformity with the latest decisions of this court.

We are much impressed with the views announced by Judge SCOTT of the Supreme Court of Illinois in the case of *Dee v. Dee*, 212 Ill. l. c. 347 (a case which supports the conclusion we have reached in the case at bar about as fully as a ruling on one will case can support another by the doctrine of analogy). In the *Dee* case Judge SCOTT says:

“In construing a will, the court derives but little assistance in determining the meaning to be given the various terms and expressions used therein from the examination of adjudged cases. No two wills are precisely alike, and the conditions which surround one testator differ so widely from those which surround another that the conclusion reached in one instance is rarely of great service as a guide in another.”

Finding that the case at bar was correctly decided by the court *nisi*, its judgment sustaining the demurrer to and dismissing plaintiffs' petition is affirmed. *Walker, P. J.*, and *Faris, J.*, concur.

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W. B. STONE v. KANSAS CITY AND WESTPORT  
BELT RAILWAY COMPANY, Appellant.

Division Two, July 14, 1914.

1. **COMMON SOURCE OF TITLE: Possession Under Erroneous Description.** It is not necessary, to constitute a common source of title, that both parties should have a good title from the common source. That would be impossible. All that is necessary is that both parties claim under the common source. So where one of defendant's predecessors in title took possession of a right of way under a deed from the owner of the land under whom plaintiff claims, which deed misdescribed one of the lots over which the grant was made, that makes a common source of title which cannot be impeached by defendant except by showing a title superior to that of the common source.

2. **QUIETING TITLE: Evidence: Deed: Made by Order of Court.** In a suit to quiet title a joint deed to the property in dispute made by the owner's assignee in bankruptcy and by a substituted trustee under a deed of trust, was properly admitted in evidence, over an objection that the power of the makers was not shown, where the deed recites that the land was sold under an order of the court in bankruptcy and under the provisions of the deed of trust.
3. **DEED OF TRUST: Substitute Trustee: Sheriff: Ex parte Appointment.** The fact that the court's appointment of the sheriff as substituted trustee to sell land was made on an *ex parte* application of the beneficiary in the deed of trust, does not render the appointment invalid.
4. **VENDOR AND PURCHASER: Real Estate: In Possession of Third Party.** He who buys property in the open and visible possession of a third person is chargeable with notice of the title and right of that person in the premises.
5. **——: Foreclosure Deed not Recorded: Purchase of Equity of Redemption.** A recorded deed of trust is constructive notice that the legal title is outstanding in the trustee, and one who, without notice of the foreclosure of the deed of trust, purchases the equity of redemption ten years after the foreclosure but before the recording of the foreclosure deed, is not entitled, in a suit to quiet title, to have the foreclosure deed declared void, although meanwhile he has completed and operated a railroad upon the land in question.
6. **——: Adverse Possession: Evidence.** Evidence *held* insufficient to establish title in defendant by adverse possession.
7. **ACTIONS: Parties: Bound by Prior Adjudication.** As regards the subject-matter, parties to a prior suit and their privies are concluded, in a second suit, as to all matters which were or might have been submitted to the court for its consideration on the issues in the first case.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield*, Judge.

**AFFIRMED.**

*John H. Lucas* and *Halbert H. McCluer* for appellant.

(1) The court erred in not declaring as a matter of law that respondent was not entitled to recover.

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(a) There was no showing that the United States had ever parted with its title to the land. Sec. 4 of the 5th Clause, Act of Admission, Stats. 1909, p. 38; Sec. 6316, R. S. 1909; *Stephenson v. Stephenson*, 71 Mo. 127. (b) The trust deed from Campbell to Swearingen did not sufficiently describe the land. (c) The trustee's deed under the above deed did not sufficiently describe the land. (d) The sale by substitute trustee and assignee in bankruptcy was not shown to have been made with authority and was hence invalid. *In re Snedaker*, 3 B. R. 155; *In re People's Mail Steamship Co.*, 2 B. R. 170; *Davis v. Carpenter*, 2 B. R. 125; *Jones v. Leach et al.*, 1 B. R. 165; *In re Vogel*, 2 B. R. 138; *Lee v. Franklin*, 3 B. R. 53; *In re Rosenberg*, 3 B. R. 33; *In re High*, 3 B. R. 46. (e) In the absence of an agreement to the contrary the taking of the land for the purpose of a right of way was an appropriation of a right of way of the usual width, being the amount allowed by law. *Hargis v. Railroad*, 100 Mo. 210; *Campbell v. Railroad*, 110 Ind. 490; *Railroad v. Cochrane*, 3 Lea (Tenn.), 478; *Railroad v. McReynolds*, 48 S. W. (Tenn.) 253. (2) Adverse user gave the appellant a prescriptive right and the court erred in not so deciding. *Boyce v. Railroad*, 168 Mo. 583; *Railroad v. Michener*, 117 Ind. 462; *Prather v. Telegraph Co.*, 89 Ind. 501; *Schultz v. Lindell*, 30 Mo. 310; *Johnson v. Prewett*, 32 Mo. 553; *Powell v. Davis*, 54 Mo. 315; *Callahan v. Davis*, 103 Mo. 444; *Ragan v. Railroad*, 144 Mo. 636. (3) The Perkins suit was not an adjudication of this matter, and the conversation about same cannot aid respondent. *Stumpe v. Kopp*, 201 Mo. 423; *Lemmons v. McKinley*, 162 Mo. 530. (4) Respondent was precluded from a recovery by failure to record the deed to Perkins until long after purchase and improvement by appellant's grantor. (5) Appellant's rights have not been lost by abandonment. *Railroad v. Railroad*, 129 Mo. 62; 1 Am. & Eng. Ency. Law, p. 1; *Scarritt v. Railroad*, 148 Mo. 683; Constitution, art. 12, sec.



14; *State v. Railroad*, 239 Mo. 234. (6) The court erred in admitting each of the following items of evidence. (a) Deed from substitute trustee and assignee in bankruptcy. (b) Appointment of substitute trustee. (c) Evidence about claims made in the Ragan case. (d) Evidence as to claim in the Ragan case and instruction asked in that case, and in not striking out that evidence. (e) Refusing to strike out exhibits 6, 15 and 18, and each of them as requested by appellant. (f) Exhibit 41, being the amended petition in the Ragan case and exhibit 42 being disclaimer. (g) Petition, summons and judgment in the suit of *Perkins v. Appellant et al.* (h) Evidence of N. F. Heitman about what was said in settlement of the Perkins case.

*McCune, Harding, Brown & Murphy and Spencer F. Harris* for respondent.

(1) The description in the deed of trust from Campbell to Swearingen is sufficient. *Loyd v. Oates*, 143 Ala. 433; *McAllister v. Honea*, 71 Miss. 259; *Waugh v. Richardson*, 30 N. C. 470; *Henry v. Whitaker*, 82 Tex. 5; *Cornwell v. Thurston*, 59 Mo. 156; *Frank v. Meyer*, 97 Ala. 437; *Rainwater v. Stevens*, 15 Mo. App. 544. (2) The description in the trustee's deed is good. (3) The sale by trustee and assignee in bankruptcy is good. The law presumes the necessary orders were procured. *Rockwell v. Brown*, 54 N. Y. 210; *Ivy v. Yancey*, 129 Mo. 509. (4) There is no presumption in the absence of a license to enter, that the railroad occupied a right of way to the full extent allowed by law. *Railroad v. Rickards*, 38 Neb. 847. (5) The original right of way, if any was ever obtained, was never occupied and was abandoned long prior to 1887. *Roanoke v. Railroad*, 108 Mo. 50. (6) There was not sufficient showing of adverse possession to vest title in appellant. *Jones on Easements*, sec. 857; *Herbert v. Merrifield*, 133 Mo. 270; *Elliott on Railroads* (2 Ed.), sec.

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948; Railroad v. Galt, 133 Ill. 670. (7) The deed from the Cases to Kansas City, Memphis & Mobile Ry. Co., being foreclosed, was not color of title when possession was taken in 1887. Jones on Easements, sec. 857; Wier v. Marsh, 21 Tex. 97; Choateau v. Riddle, 110 Mo. 366; Snyder v. Railroad, 112 Mo. 540. (8) The Case deed cannot constitute color of title as possession was not taken by the first taker under such deed. Norfleet v. Hutchings, 68 Mo. 598. (9) Where holder of legal title is in possession of whole tract, and claimant under color of title deed enters, such claimant can only acquire title by adverse possession to part actually occupied. Ozark Plateau v. Hayes, 105 Mo. 151; Bradley v. West, 60 Mo. 40; Leefer v. Baker, 68 Mo. 450; Lynde v. Williams, 68 Mo. 369. (10) Right of way deed over lot 104 is no presumption of intent to convey right of way across lot 101. Railroad v. Rickards, 38 Neb. 847. (11) The case brought by Stephen Perkins settled all questions as to the width of the right of way. Bradley v. West, 60 Mo. 69. (12) The failure to record the trustee's deed, cannot affect respondent's right, as deed of trust under which sale was made was of record before the Case deed was executed.

ROY, C.—This is a proceeding to quiet title to real estate. There was a judgment for plaintiff from which defendant has appealed.

The petition was filed September 26, 1908, and contains the following: "Plaintiff for his cause of action

against said defendants states that he is the owner of all of lots 101 and 104 in Campbell's Addition to the town of Westport, now a part of Kansas City, Jackson county, Missouri, except a right of way over and across said lots, extending for a distance of ten feet on each side of the center line of the present railroad now located over

and across said property. Plaintiff further states that defendants, Kansas City and Westport Belt Railway Company and the Metropolitan Street Railway Company claim an interest in and to a part of said property adverse to that of plaintiff, the part claimed by said defendants, being a strip of ground over and across said lots, extending fifty feet on each side of the center line of said railroad." Then follows the usual prayer for relief in such cases.

The answer contains the following: "Comes now the Kansas City & Westport Belt Railway Company, and for its separate answer to the petition of the plaintiff filed herein states that it is now, and has been for thirty years or more, the owner of the easement over and upon, and in the possession of, the property described in plaintiff's petition, to-wit: All of lots 101 and 104, Campbell's Addition to the town of Westport, now a part of Kansas City, Jackson county, Missouri. Wherefore defendant prays the court to enter a decree herein declaring this defendant to be the owner of the easement referred to herein over said lots, and further declare that plaintiff has no right, title or interest in or to said property, and for its costs herein expended."

The reply was as follows:

"Now comes plaintiff and for reply to the answer filed herein by defendant Kansas City & Westport Belt Railway Company denies that said defendant is in possession of or entitled to any right of way or easement over the land described in plaintiff's petition, except the right of way in such petition described, and denies that defendant has been in possession of any right of way over said land except the right of way described in plaintiff's petition, for a period of thirty years or for any other period of time.

"Plaintiff for further reply to said answer says that if said defendant or any person or corporation under whom it claims ever had any right of way over and across said land, except the right of way described

in plaintiff's petition, it or they have long since been lost and extinguished by abandonment.

"Plaintiff for further reply to said answer says that all the rights of said defendant Kansas City & Westport Belt Railway Company over and across said property was fixed and determined by a judgment of the circuit court of Jackson county, Missouri, at Kansas City, in an action wherein Sophia Perkins, John S. Perkins and Robert Perkins, under whom plaintiff claims title to the property described in plaintiff's petition, were plaintiffs, and the Kansas City, Osceola & Southern Ry. Co., John I. Blair, DeWitt C. Blair, C. Ledyard Blair, Clarence B. Mitchell, Henry Pfeiffer and said defendant Kansas City & Westport Belt Railway Company, were defendants, in which judgment the right of said defendant to an easement or right of way over and across said property was fixed and determined and such right of way established as described in plaintiff's petition. Wherefore plaintiff asks judgment as in his petition prayed."

On April 23, 1868, Theodore S. and Oliver Case, having color of title to said lots 101 and 104, and being in possession thereof, executed a deed of trust on the lots to George W. Doggett as trustee to secure the payment of a debt to Stephen Perkins, with the usual provisions for sale by trustee in case of default, but there was no provision for a sale by a substitute trustee. It was acknowledged, and recorded on April 29, 1868.

The plaintiff read in evidence an entry in the records of the circuit court of Jackson county, dated October 31, 1874, as follows:

"This day comes Stephen Perkins, by his attorney, and presents his petition, sworn to, stating among other things that he is the beneficiary or *cestui que trust* in a certain deed of trust executed on the 23d day of April, 1868, by Theodore S. Case, Julia M. Case and Oliver Case, to George W. Doggett, trustee,

conveying certain real estate and personal property therein described, and situated in the city of Westport, county of Jackson and State of Missouri, to said Doggett in trust to secure the payment of certain notes therein described of which said Perkins was then and still is the legal owner and holder. That a part of the interest and principal of said notes remains due and unpaid and that said George W. Doggett, trustee, has since died, leaving no one authorized by the terms of said deed to execute the same, and praying the court for the appointment of the sheriff of the county trustee to execute said trust.

“It is therefore ordered and adjudged that C. B. L. Boothe, sheriff of the county, be and is hereby appointed trustee in place and stead of said George W. Doggett, deceased, to execute said trust.”

There was no showing of the service of any summons or notice on any one to appear in such proceeding. The defendant objected to such evidence on the ground of irrelevancy, incompetency and immateriality, and because the court had no power to make such appointment on the showing recited in the order. The objection was overruled.

Plaintiff read in evidence a deed of assignment by the register in bankruptcy in the District Court of the United States for the Western District of Missouri, assigning the property and estate of Oliver Case & Co. and Theodore S. Case, bankrupts, to John A. Ross, assignee in bankruptcy. Also a deed dated June 18, 1877, executed by John A. Ross, assignee in bankruptcy, as aforesaid, and by C. B. L. Boothe, sheriff, the substitute trustee, to Stephen Perkins, foreclosing the deed of trust dated April 23, 1868, to which defendant made the formal objections, and also objected on the ground that it was not shown that the parties had any authority to make the deed. That deed was not recorded until June 22, 1891. It recited that it was

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made in pursuance of an order of said district court and that the sale had been approved by that court.

On August 27, 1873, after the execution of the foregoing deed of trust and before its foreclosure, the Cases executed a conveyance of a right of way to the Kansas City, Memphis & Mobile Railroad Company, twenty-five feet wide on each side of the center line of its railroad through lots 102, 103, 104 and 178 in said addition. There was no lot 178 in that addition. Immediately following the execution of that deed, the grantee graded its road through lots 101 and 104 on the line where defendant's track now runs.

After the purchase by Stephen Perkins under the foreclosure of the deed of trust on the lots, he took possession and built a fence around the lots including the grade of the railroad.

On January 28, 1887, the Kansas City & South-eastern Railroad Company became the owner by mesne conveyances of the railroad and its right of way through lots 101 and 104, all of which were at that time enclosed by said fence. It constructed its road along and over that old grade during that year. At what period during that year the work was done is not shown. The evidence does not show that the road bed occupies any ground more than ten feet from the center of the track. In 1891 the railroad company repaired and improved its track through those lots and piled material for bridges and track construction on the lots along its track, the distance from the track not being definitely shown. In the years 1891 and 1892, cars of freight were placed on the track at that place and unloaded there by wagons which came on the unenclosed lots for that purpose. During the work of 1891, dirt was taken from places within twenty-five feet on each side of the center of the track for improvement of the roadbed. There was rock there, and the dirt was not taken over six inches deep.

On July 20, 1897, the defendant became the owner of the railroad by deeds which described its right of way as a hundred feet wide.

Stephen Perkins died intestate, leaving a widow, Sophia, and his children, John S. and Robert H., his sole heirs, who on August 30, 1897, brought suit against this defendant in the circuit court, the petition alleging that Stephen Perkins was the owner of said lots in his life time, and that he died intestate, and that the plaintiffs therein, as his widow and heirs were the owners of said lots. It then contains the following:

“That heretofore, to-wit, on the — day of August, 1897, the above named defendants did wrongfully take and appropriate for the purpose of a railroad right of way a strip of land running diagonally through said lots to the extent of ten feet on each side of the center line of the railroad roadbed, as the same is now located and situated on said lots. That said defendants took and appropriated said strip of land as aforesaid without any condemnation proceedings, or other lawful right to do so, and without the consent of the plaintiffs, or either of them, and did so without paying any compensation whatsoever, and that no compensation has ever been paid to the plaintiffs, or either of them, on account of the wrongful taking of said strip of ground for public use as aforesaid.”

The petition then offered to convey the title to the right of way to defendant, and prayed for \$5000 as damages for the appropriation.

On October 12, 1901, judgment was rendered in that case as follows:

“Now on this day the above entitled cause coming on regularly to be heard and the defendant, Kansas City & Westport Belt Railway Company and defendants having filed their answer herein, and the plaintiffs appearing by N. F. Heitman, their attorney, and the defendants appearing by Johnson & Lucas, their attorneys, and the parties duly waived a jury in open

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court, and the court having heard and duly considered the pleadings, evidence and arguments of counsel, finds the issues in favor of the plaintiffs and assesses plaintiff's damages at the sum of six hundred dollars.

"Wherefore, it is considered, ordered and adjudged by the court that plaintiffs have and recover of and from the defendants the sum of six hundred dollars and costs of suit on account of the appropriation of a right of way for railroad purposes over the premises described in plaintiff's petition, situate in Jackson county, Missouri, to-wit: Lots one hundred and one and one hundred and four in Campbell's Addition to the town of Westport, now a part of Kansas City, Missouri, across the above described tract of land as said right of way is now located thereon; said appropriation of said right of way having taken place without the payment of just compensation, as alleged in plaintiff's petition. And defendants did in open court pay to the plaintiffs the damages as aforesaid and the plaintiffs acknowledge satisfaction of the judgment aforesaid.

"Wherefore, it is ordered, adjudged and decreed by the court that the title to said premises be fully vested in the above named defendant Kansas City & Westport Railway Company, free and clear from any and all claims."

With reference to that suit, John S. Perkins for plaintiff testified as to conversations between him and his counsel, Mr. Heitman, on one side, and Mr. Lucas, counsel for defendant, and Mr. Miller, its president, on the other side. He testified as follows:

"Q. State what was said by Mr. Lucas and Mr. Miller with reference to the right of way. A. Of course, I was introduced first and Mr. Heitman said we came over in regard to that matter, and I don't remember all that was said; but Mr. Lucas says, we are entitled to fifty feet. I says, well, if you take fifty feet you ruin the balance of our lot, it does not leave us



any frontage, and we would want pay for all of it, for the whole property. And we talked on a little bit and he said to Mr. Miller that we can get along all right with twenty feet, and my recollection is that Mr. Miller decided that twenty feet would be sufficient, and that was the final windup of it. I don't remember just exactly all that was said, it has been a good while ago, but that was the final windup and he decided—

“Mr. White: We object to what was decided.

“Q. Just tell what was said. A. They said they would take the twenty feet and agreed on the price.

“Q. What were they to pay for it? A. Six hundred dollars and pay the court costs.

“Q. Did they at any time claim to own or occupy more than twenty feet?

“Mr. White: I make the same objection as made to the principal question, and for the same reason.

“Objection overruled. To which ruling and action of the court the defendant then and there at the time duly excepted and still excepts.

“A. No, sir, they never claimed any.

“Q. Did they at any time afterwards, up to the time you sold it, make any claim to more than twenty feet? A. No, sir.”

On cross-examination the following occurred:

“Q. The suit had already been filed? A. It had been filed virtually by agreement between the parties that that was all that they would need. It was a friendly suit.”

In reference to that matter Mr. Lucas testified:

“Q. You bought a right of way from the Perkins in those negotiations? A. Did what?

“Q. Bought a right of way? A. No, sir, I bought peace. I had a right of way but I bought peace, just as I have done for twenty years in railroad litigation. They claimed adversely and I purchased my peace in the matter of these people.

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"Q. You purchased what they were claiming?  
A. I purchased whatever rights they were asserting there at that time.

"Q. Did you assert at that time any rights to any more than you purchased? A. I don't recall whether I made any statement about any rights more than I purchased, or not, for I don't recall the conversation. I have got only a faint impression in my mind that somebody introduced me to Mr. Perkins, and I don't recall now whether I ever saw him more than that once.

"Q. The right of way you did pay for was ten feet on each side of the center line? A. I would not be able to tell you that. The pleadings would show whatever that was.

"Q. Wasn't the matter of the width of the right of way taken up at that time by you and Mr. Heitman and Mr. Perkins, and didn't they offer you whatever you were willing to pay for, and you said that was all you needed, was what your track occupied, and that was all you wanted? A. I would be unable to answer about that conversation, because my mind is indistinct about it. If some circumstance was recalled I might remember what the conversation was, but I will say in a general way, of course I wouldn't attempt to conclude my company's right by any negotiations for any less from Mr. Perkins, who was insisting he had a right there. I don't remember what the defense was that I believed I had, whether I claimed to have a deed or by virtue of condemnation. If it is important I can refresh my recollection by the files in the Perkins case, but in any event, whatever I did there was simply to buy peace."

In 1904 the defendant again used twenty-five feet on each side of the center of its road to pile material, and to get dirt for the repair of its track. On March 5, 1905, plaintiff obtained a warranty deed from the widow and heirs of Stephen Perkins for the lots sub-

ject to a right of way for defendant's road ten feet wide on each side of the center of its track. The right of way was never fenced from the balance of said lots until just before this suit was brought, when a fence was put up along the boundaries of the twenty-foot strip. Defendant tore that fence down and put up one along the outer boundaries of the land in controversy.

I. Objections were made to several of the deeds introduced in evidence by plaintiff in the chain of title to the Cases. We shall not consider the merits of those objections. The Cases are the common source of title. To constitute a common source of title, it is not necessary that both parties should have a good title from the common source. That would be impossible. All that is necessary is that both parties claim under the common source. The deed for the right of way from the Cases, made in 1873, described the lots as Nos. 102, 103, 104 and 178. There was no lot numbered 178. Immediately after the making of that deed the road was graded through lots 101, 102, 103 and 104. There is no doubt that lot 101 was intended instead of lot 178. Possession for the purpose of grading the track was undoubtedly taken under the Cases and because of that deed for the right of way. That makes a common source of title which cannot be impeached by defendant except by showing a title superior to that of the common source. [Miller v. Hardin, 64 Mo. 545; Feller v. Lee, 225 Mo. 319.]

II. Appellants insist that the deed made jointly by the assignee in bankruptcy and by the substituted trustee under the deed of trust to Stephen Perkins was improperly admitted in evidence. The objection to the deed was that it was "incompetent, irrelevant and immaterial, because it is not shown that the parties had any power to make the deed." The deed

**Evidence:  
Deed Made  
by Order  
of Court.**

## Stone v. Railroad.

recites that it was sold under an order of the court in bankruptcy and under the provisions of the deed of trust. It also recites that the sale was approved by the court. There was no objection on the ground that the orders of the court were not shown in evidence. We hold that the objection was properly overruled.

III. The fact that the sheriff was appointed as a substitute trustee under the deed of trust on an *ex parte* application of the beneficiary in the deed of trust does not invalidate such appointment.

Ex Parte  
Appointment  
of Sheriff as  
Trustee.

Sections 1 and 2, Revised Statutes 1855, pages 1554-5, provide for the appointment of the sheriff as such substitute trustee on the application of the beneficiary in a deed of trust. By the act of February 2, 1872 (Laws 1872, p. 67, sec. 1), it was provided that on such application the court should appoint "the sheriff or some other suitable person of the county" as such trustee. That section is now 11920, Revised Statutes 1909. In *Martin v. Paxson*, 66 Mo. l. c. 265, it was said: "No notice of such application is necessary; none is required by the statute. The proceeding is *ex parte*, and upon affidavit only; and by the provisions of the statute in force at the time the substitution in the present case was made, no question could arise as to the propriety of the appointment to be made by the court, as, under that statute, no other person than the sheriff of the county could be appointed."

In *Thompson v. Foerstel*, 10 Mo. App. 290, the appointment of a person other than the sheriff was upheld. In *Hitch v. Stonebraker*, 125 Mo. l. c. 138, this court said that such statute was in derogation of the common law and should be strictly construed. In *Tatum v. Holliday*, 59 Mo. 422, and in *State ex rel. v. Griffith*, 63 Mo. 545, it was held that a sheriff, acting under such statutory appointment, does so officially. His bond as such sheriff secures his faithful discharge

of the duties of such trustee. We are not deciding as to whether the court can appoint "some other suitable person," but we do hold that the appointment of the sheriff on such *ex parte* application is valid.

IV. The deed by the assignee in bankruptcy and the substitute trustee under the deed of trust was withheld from record from its date, June 18, 1877, until June 22, 1891. Appellant's brief contains the following:

"In the time intervening the Kansas City & Southeastern Ry. Co. purchased the property, took possession, completed the road, and expended a large sum of money in so doing, and had operated the road for about four years.

"Respondent's grantor, having withheld his deed from record and stood by and witnessed the purchase and improvement of the property by appellant's grantor, cannot now make claim against appellant."

When the Kansas City & Southeastern got its deed to the road on January 28, 1887, these lots including the right of way were enclosed with a fence and were in the possession of Stephen Perkins. "He who buys a piece of property in the open and visible possession of a third person is chargeable with notice of the title and right of that person in the premises." [Wiggenhorn v. Daniels, 149 Mo. l. c. 165; Squires v. Kimball, 208 Mo. l. c. 119.]

The defendant and all those under whom it claims were at all times affected with constructive notice by the record that the legal title to the lots was outstanding in the trustee under the deed of trust in which Doggett was named as trustee. As between the trustee and Stephen Perkins that legal title passed by the foreclosure sale. The purchase of the equity of redemption, after the foreclosure and before the recording of the foreclosure deed, without notice of such

Purchasing  
Property In  
Visible Pos-  
session of a  
Third Party.

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**Foreclosure  
Deed not  
Recorded.**

foreclosure to the purchaser of the equity, would not have the effect of entirely avoiding that sale as between the purchaser of the equity and the purchaser under the foreclosure. At most, such failure to record would only let in the purchaser of the equity to redeem the land from the the deed of trust. We are frank to say that we have found no case squarely in point. But it has been held that where the foreclosure sale is irregular and not void, such irregularity can only be taken advantage of in an action to redeem. [Adams v. Carpenter, 187 Mo. 613.] In such action to redeem, the plaintiff herein would be in the position of holding the legal title which was formerly in the trustee.

**Adverse  
Possession:  
Evidence.**

V. We thus find, as a result of the foregoing conclusions, that the record title to the land in controversy is in the plaintiff, and the question remains as to whether defendant has acquired title by adverse possession. The evidence does not show at what time in the year 1887 the track was constructed across the lots. On August 30, 1897, the Perkins suit against this defendant was instituted. It does not appear that ten years had intervened since the track was constructed. The witnesses Heitman and John S. Perkins for plaintiff testified that such suit was filed under an arrangement by which it was agreed that twenty feet was all defendant wanted for its right of way. Mr. Lucas, witness for defendant, disclaimed being able to remember what was said in that conversation. We are justified in finding that such suit was brought under such agreement. Such being the case, the defendant was not on August 30, 1897, asserting any claim to the land in controversy, but had yielded such claim. It had not prior to that time acquired title by adverse possession, because there is a lack of evidence to show

that ten years had then expired since the track was built. One who asserts title by adverse possession has the burden of proving it. [Hulsey v. Wood, 55 Mo. 252.]

Defendant having on August 30, 1897, ceased to make any claim to the land in controversy, whatever right it may have by adverse possession must have accrued since that date. The possession under claim of right must have been continuous. Possession under a claim of right since 1897 cannot be tacked onto such possession under claim of right prior to 1897, because of the break in the claim.

We therefore inquire whether, since 1897, the defendant has had the continuous adverse possession of the land in dispute under a claim of right.

The judgment in the Perkins case is *res judicata* against the defendant on the proposition that defendant was not, at the date of the institution of that suit, the owner of the twenty-foot strip either by paper title or by adverse possession. The evidence in this case

*Res Judicata.* does not show whether the deeds in defendant's chain of title were in evidence in that case. They were proper evidence and *might* have been introduced in that case to show defendant's title to the twenty-foot strip. So far as the subject-matter is concerned in another suit, the parties to the former suit and their privies are concluded as to all matters which were or which might have been submitted to the court for its consideration on the issues in the first case. [Donnell v. Wright, 147 Mo. l. c. 647; Hamilton v. McLean, 169 Mo. l. c. 73.]

The court adjudged in the Perkins case that the deeds under which defendant claims did not constitute title to the twenty-foot right of way. That judgment, itself, decreed the title to that strip to defendant in consideration of the \$600 damages adjudged to the plaintiffs therein. Since that decree defendant has not held that right of way under any color of title.

but under an actual title, i. e., that judgment. The defendant certainly does not hold actual adverse possession of the twenty-foot strip under color of title to the whole fifty feet.

In *Crispen v. Hannavan*, 50 Mo. l. c. 544, it was said: "Ordinarily, the possession of one who does not hold the true title can extend only to the land in actual occupancy. The owner, who holds constructive possession of all lands not actually occupied by others, cannot be disseized by a mere claim. There must be something more. In addition to the actual occupancy of a part—the open, notorious and continuous possession as owner—there must be a claim to the whole, by the same right under which the part actually occupied is held, and such claim must be *bona fide* and evidenced by some paper or proceeding, or relation, that makes the claimant the apparent owner of the whole. [*Fugate v. Pierce*, 49 Mo. 441.]"

After the decree in the *Perkins* case the plaintiff's deeds did not constitute color of title to the land in controversy. A claim of right under color of title includes good faith, and good faith is destroyed when the color of title is adjudged worthless as between the parties. [*Sholl v. Coal Co.*, 139 Ill. 21; *Hintrager v. Smith*, 89 Iowa, 270.]

Appellant claims that under the authority of *Hargis v. Railroad*, 100 Mo. 210, it will be presumed that defendant's possession extended to the full statutory width of a hundred feet. That case says that such is the presumption where there is nothing appearing to the contrary. In this case defendant does not even claim a hundred feet, and its actual possession is confined to the twenty-foot strip decreed to it by the court. It has no color of title outside the twenty-foot strip.

There are numerous other questions raised in the briefs of counsel, but the propositions above announced



are decisive of the matters involved. The judgment is affirmed. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

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GEORGE B. NEAR v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

Division Two, July 14, 1914.

1. **EVIDENCE: Sufficiency: Demurrer.** In passing upon the sufficiency of the evidence, when challenged by demurrer, the general rule is that plaintiff's evidence (if not impossible or opposed to the physics of the case or entirely beyond reason) is taken as true and plaintiff is further entitled to the benefit of every reasonable inference of fact arising on all the proof. But this does not relieve plaintiff from the necessity of producing substantial testimony to prove the issues involved. A mere glimmer or spark, a mere scintilla, will not do.
2. **NEGLIGENCE: Master and Servant: Inspection of Freight Cars by Railroad.** As regards liability to its employees, it is the duty of a railroad company to discover dangerous defects in cars and equipment received from other roads, if the defect be such as can be discovered by the exercise of ordinary care.
3. **——: ——: ——: Ordinary Care: Defective Brake.** The plaintiff, a switchman employed by defendant, was injured while setting a tunnel brake on a box car received from another road and previously inspected by defendant. Plaintiff's evidence tended to show that the brake was defective; that after it was broken from one-third to two-thirds of the broken end looked like a fresh break; that the break occurred near the place where the staff entered the brake wheel; that the break was irregular, beginning one-fourth to one-sixteenth of an inch outside the socket of the brake wheel and extending a like distance down into the square portion of the staff covered by the wheel socket; that the old break appeared on the end of the broken portion which extended out of the

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socket; and that the staff broke because of said defect while plaintiff was applying the brake, causing him to fall and be injured. Plaintiff testified that he tested the brake when he first boarded the car, and that it sounded all right. *Held*, that plaintiff failed to make a case for the jury, there being no obligation on the defendant to use more than ordinary care in inspection, whereas only extraordinary precaution, such, for example, as taking the brake to pieces, would have revealed the defect.

Appeal from Jackson Circuit Court.—*Hon. James E. Goodrich*, Judge.

REVERSED AND REMANDED.

*W. F. Evans and Cowherd, Ingraham, Durham & Morse* for appellant.

Plaintiff failed to establish a case. (a) There must be some substantial evidence to uphold a verdict. *Dutcher v. Railroad*, 241 Mo. 167; *McNulty v. Railroad*, 166 Mo. App. 461; *Champagne v. Hamey*, 189 Mo. 729. (b) The only duty resting upon defendants was reasonable inspection. *Gutridge v. Railroad*, 94 Mo. 474; *O'Flanagan v. Railroad*, 145 Mo. App. 283; *Howard v. Railroad*, 173 Mo. 529. (c) The physical facts negative all question of negligence. *Champagne v. Hamey*, 189 Mo. 726; *Phippin v. Railroad*, 196 Mo. 343; *McClanahan v. Railroad*, 147 Mo. App. 409. (d) The custom followed by the railroads of the country in the matter of inspection was the measure of ordinary care. *Brunke v. Railroad*, 115 Mo. App. 39; *O'Mellia v. Railroad*, 115 Mo. 221; *Kane v. Falk Co.*, 93 Mo. App. 215; *Hunt v. Seal Co.*, 104 Mo. App. 389; *White v. Railroad*, 84 Mo. App. 417; *Henry v. Railroad*, 66 Iowa, 52; *Maynard v. Buck*, 100 Mass. 40; *Reed v. Railroad*, 94 Mo. App. 371. The mere breaking of the staff was not in itself proof either of the defect or of negligence in failure to discover the same. El-

liott v. Railroad, 204 Mo. 1; McGrath v. Transit Co., 197 Mo. 104; Yarnell v. Railroad, 113 Mo. 570; Murphy v. Railroad, 115 Mo. 111; Wornstein v. Railroad, 195 Mo. 440; Bowen v. Railroad, 95 Mo. 274; Bohn v. Railroad, 106 Mo. 429; Howard v. Railroad, 173 Mo. 531. (e) To warrant a verdict on an inference of negligence that must be the only inference fairly deducible from the evidence. McGrath v. Transit Co., 197 Mo. 104; Ryan v. McCully, 123 Mo. 646; Fink v. Railroad, 161 Mo. App. 325; Smith v. Bank, 99 Mass. 612; Smart v. Kansas City, 91 Mo. App. 593. The master is entitled to the presumption of ordinary care until negligence is proven. Elliott v. Railroad, 204 Mo. 14; Yarnell v. Railroad, 113 Mo. 570; Murphy v. Railroad, 115 Mo. 111; Hornstein v. Railroad, 195 Mo. 440.

*Boyle, Guthrie, Howell & Smith and Jos. S. Brooks* for respondent.

(1) There was substantial evidence to sustain the verdict. It was the duty of the appellant to exercise ordinary care to discover defects in the brake-staff. It was for the jury to say whether or not reasonable and proper care was exercised in the inspection of the brake-staff. The weight of the testimony was a question for the jury. Guttridge v. Railroad, 105 Mo. 520; Dutcher v. Railroad, 241 Mo. 167; Railroad v. Slattery, L. R., 3 App. Cas. 1155; Mosely v. Railroad, 132 Mo. App. 649; Winkle v. Dry Goods Co., 132 Mo. App. 666. (2) It is elementary in this State that a demurrer admits every fact to be true which the evidence in the case tends to prove, whether by direct testimony, or by reasonable deductions to be drawn therefrom. Von Trebra v. Gaslight Co., 209 Mo. 658; Meily v. Railroad, 215 Mo. 586; Hach v. Railroad, 208 Mo. 601; Kinlen v. Railroad, 216 Mo. 155. (3) A demurrer to the evidence should never be given in any case where the facts bearing upon the issues are disputed, or un-

disputed and admit of different constructions and inferences, or about which reasonable minds might differ. *Williamson v. Transit Co.*, 202 Mo. 376. (4) A railroad company is bound to inspect foreign cars just as it is required to inspect its own. *Gutridge v. Railroad*, 94 Mo. 474. (5) The gravamen of the situation here is not the failure to inspect, but the failure to make proper inspection. *O'Flanagan v. Railroad*, 145 Mo. App. 283; *Gutridge v. Railroad*, 105 Mo. 527. (6) The inspector should adopt such reasonable methods and apply such reasonable tests as are likely to discover defects, if they exist. It is not sufficient, merely to look at a brake-staff nine feet from the ground in passing by; such an inspection is not reasonable. It would not be likely to discover defects even if they did exist. *Gutridge v. Railroad*, 105 Mo. 527; *Wood v. Railroad*, 187 Mo. 445; *Allen v. Railroad*, 26 Cent. Rep. 297; *O'Flanagan v. Railroad*, 145 Mo. App. 281. (7) Ordinary care is great care when there is an extraordinary hazard; what is ordinarily done is not conclusive of due care. *Tallman v. Nelson*, 141 Mo. App. 484; *Jewell v. Powder Co.*, 166 Mo. App. 567; *Hovarka v. Transit Co.*, 191 Mo. 454; *O'Dowd v. Railroad*, 166 Mo. App. 669. (8) The standard, by which a given act is to be classified as careful or negligent, is fixed by an inflexible rule of the substantive law, and not by usage or custom. *Brunke v. Telephone Co.*, 115 Mo. App. 38; *White v. Railroad*, 84 Mo. App. 417; *Wigmore on Evidence*, sec. 461.

**WILLIAMS, C.**—This is a suit to recover damages for personal injuries. Plaintiff recovered judgment in the sum of fifteen thousand dollars in the circuit court of Jackson county, Missouri, and defendant appealed. That portion of the petition containing the charge of negligence was as follows:

“The defendant did negligently deliver to and cause the plaintiff to work as such switchman upon a

certain freight car, not owned by defendant, and negligently failed to properly inspect the same before causing plaintiff to work on same, which said car was worn, defective and out of repair in this that there was upon the said car a certain hand brake consisting substantially of a wheel revolving upon a shaft or staff for the purpose of tightening brakes on said car, the said shaft or crank of which was and had for a long time theretofore been worn, defective and out of repair, cracked and broken, and but a very small and insufficient portion thereof remained intact, and same was not sufficiently strong to resist the application of a reasonable and proper amount of power used upon said wheel for the purpose of setting such brakes; all of which was unknown to the plaintiff but was or could, by the exercise of due care, have been known to the defendant."

The evidence on the part of plaintiff tended to show the following facts: At the time of receiving the injuries, plaintiff was an employee of defendant company, in the capacity of field switchman, in the company's switch yards in Kansas City, Missouri. His hours of work were in the nighttime. The duty of the switch screw, with which plaintiff was working, was to switch freight cars from the connecting lines onto the proper tracks of the defendant's switch yards. The cars from the connecting lines would be attached to an engine of the defendant company and moved into the defendant's switch yards and plaintiff, acting as field switchman, would throw the respective switches so as to shunt the respective cars upon their proper switch track destination; that in doing this it sometimes became necessary for plaintiff after letting a car into the switch track to climb upon the same and stop it by setting the brakes on the car. Plaintiff was injured about 2 a. m., and on the night in question the switch engine and switch crew with which plaintiff worked took a "drag" of cars (includ-

ing one box car of the Pennsylvania Railroad, which was the car that injured plaintiff), from the connecting tracks of the Chicago, Milwaukee and St. Paul Railroad to the defendant's yards for the purpose of shunting the respective cars of said "drag" into the proper switch destination. It was intended that the Pennsylvania car should be placed on switch track No. 26, but on account of some mistake, not important to the present controversy, plaintiff opened the switch to track No. 27 and the Pennsylvania car was shunted into that switch track. After the car came upon that switch track, plaintiff climbed upon the forward end of said car for the purpose of riding the car down the switch and stopping it at its proper place by setting the brake on the car. This car was equipped with what is known as a tunnel brake. The tunnel brake is attached to the car in the following manner. The brake staff, being a piece of iron about an inch and one-half in diameter, is attached to the end of the car on the outside of the car, approximately five feet above the bottom of the car, and projects out from the car a distance of eight or ten inches. On the outer end of this brake staff the brake wheel, twenty-two inches in diameter, is located, the end of the brake staff being square so as to fit into a square socket in the wheel. The ratchet wheel is attached to this brake staff near the place where the staff enters the end of the car. The brake staff is supported at the outer end by an iron brace or bracket which comes out from the body of the car and encircles the brake staff near the place where it enters the socket of the brake wheel. The brake chain is attached to the brake staff at some point between the ratchet wheel and the brace. The end beams at the bottom of the box car extend out a distance of approximately eighteen inches, which furnishes a platform upon which the person operating the brake may stand. On the night in question, after plaintiff had climbed on the front end of the moving

car, he first tested the brake to see if it was working properly. This was done by turning the brake wheel so that the slack was taken out of the chain and turning the brake until he heard the brake shoes catch on the wheels; that it "sounded all right" and that thereafter the car progressed about three car lengths and up near the place where plaintiff desired to stop the car and then plaintiff commenced to set the brake. While in the act of setting the brake, the brake staff broke in two allowing the brake wheel to drop off, thereby causing the plaintiff to lose his balance and fall in the middle of the track in front of the moving car. The car continued down the track and over plaintiff. At the time of the accident plaintiff was about forty years old, in good health, weighing about 205 pounds. Some of the bones in his left foot were broken or thrown out of place; his right leg was broken between the knee and the hip and his right foot was injured. After the car stopped plaintiff crawled out from under the car and called for help. Describing his injuries at that time, plaintiff says: "I was bruised all over; I had pains all over." He was then taken to the hospital and given treatment. At the time of the trial, which occurred about a year and a half after plaintiff was injured, he weighed about 185 pounds and was unable to walk without the aid of crutches; his right ankle was stiff and his left ankle was very nearly stiff—the bones in both ankles being affected with ankylosis; the muscles of the right leg were somewhat atrophied and the right leg was partly paralyzed. He testified that he could not walk without the aid of crutches and that he had been unable to do any work since the accident and the doctor testified that his injuries were permanent. Plaintiff's evidence further tended to show that the brake staff broke near the place where it goes into the socket of the brake wheel; that the break was irregular, starting at a distance of from one-sixteenth to one-fourth of an inch from the

brake wheel and extending in an irregular manner a similar distance down into the square portion of the brake staff, which was covered by the socket of the brake wheel. Mr. Munson, who was the foreman of the switching crew with which plaintiff was working on the night of the injury, heard plaintiff call for help and went down to where plaintiff was lying on the ground. This witness picked up the brake wheel and examined the place where the staff had broken and said that the cross-section of the portion of the broken staff which had remained in the brake wheel showed that about two-thirds of the break was an old break and the remainder appeared to be a fresh break; that the old break extended to about two-thirds of the circumference of the staff; that the broken portion of the staff projected about one-sixteenth of an inch from the socket of the brake wheel on one edge of the socket and that the fresh portion of the break was down in the socket. Claud M. Donahue was working for the defendant company as a switchman in another part of its yards at the time plaintiff was injured and was present when Mr. Munson examined the brake wheel containing a portion of the broken staff. This witness said that about one-third of the break appeared to be an old break and the rest of the break was bright, appearing to be a new break; that a portion of the brake staff, where the cross-section showed the old break, protruded out of the brake wheel socket about one-fourth of an inch; that "it was broke angling like you would break a stick or anything; there was about one-quarter of an inch was up and the other went back into the square place in the brake wheel." When asked what part of the circumference of the broken cross-section appeared to be an old break he said: "At that time it was about half an inch or something that a way." Plaintiff's evidence further tended to show that it was the custom in the switchyards for the company's car inspectors to inspect the exchanged cars



before the switchman took charge of them. It further appears from the evidence that in making inspections of these cars the inspector makes a memorandum of any defects he discovers and a copy of these memoranda is furnished the railroad company from whom the car is received. Plaintiff introduced as a witness Mr. Robert Morrow, the foreman of the car department of the Chicago, Milwaukee & St. Paul Railroad Company, and this witness produced an inspection sheet, which had been furnished his company by the defendant company, with reference to an inspection made on this car by the defendant's inspector at 3 p. m., the day before the accident. This report showed that there were no side doors on the car; that one end sill and one intersill were broken and that there was a hot box on the brake end of the car and that the car was leaking coke at the right and left side doors. Plaintiff's evidence further tended to show that when brake staffs break or crack, the breaking or crack occurs either at the place where the bolt goes through which fastens the chain onto the brake staff or at the place where the brake staff goes into the socket on the brake wheel. Plaintiff's evidence further tended to show that the brace which came down from the end of the car to hold the brake shaft in line encircled the brake staff at a distance of about one-eighth of an inch to three-eighths of an inch from the hub of the brake wheel. During the progress of the trial, the original wheel containing what purported to be the remnant of the broken brake staff was exhibited to plaintiff's witness Mr. Munson and he was asked if it was the same in appearance as when he examined it on the night plaintiff was injured. He testified that it appeared the same except that the broken portion of the shaft did not appear to project out of the wheel socket as far as it did when he examined it.

Defendant's evidence tended to show the following facts: The brake wheel which was the one

in use on the night in question was introduced in evidence and in the socket of the brake wheel was the square portion of what was purported to be the broken end of the brake staff. This wheel and broken portion of the staff were exhibited in this court upon the oral argument of the case. Defendant's witnesses testified that the brake wheel and the broken portion of the staff were the same in every particular as they were when the break first occurred. The exhibit in its present condition shows that the entire break, at least with reference to the outer surface of the brake staff, is confined within the wheel socket. The surface of the broken staff does not project out of the socket, but in the center of the cross-section of the broken staff a portion projects about one-sixteenth of an inch beyond the level of the socket. Other witnesses for defendant testified that they examined the broken staff a short time after the accident and that the break occurred where the square portion of the staff joins onto the round portion. Mr. Hartman, the blacksmith for the defendant company, testified that he had been doing railroad blacksmithing work for twenty-three years and that he repaired this broken staff after the accident and that this was the only broken staff of that kind that he had ever been called upon to repair. Mr. Zeigler, defendant's foreman of the repair track at the time of the accident, testified that the method of inspecting cars, coming from other roads into the Frisco yards at the time of this accident, which was the same inspection given by all the railroads under similar circumstances, was for the inspector to look for all breaks that he could see with his eye; that brake staffs became cracked by reason of being struck by some object and that if they were struck they will either be bent or break clear off and that the inspector in inspecting the car would look at the brake and if it appeared to be straight and all the parts there he would not give it any further inspec-

tion and that it is not the practice for the inspector to get up near the brake staff and closely scrutinize it; that in his experience he never knew of a brake staff being cracked by being struck by something that was not bent so as to be noticeable by the inspector. John T. Bauch testified that he was car inspector for the Frisco at the time of the accident and that he, together with another inspector, made an inspection of the car in question, the day before the accident, and found the defects therein as shown in the list furnished to the Chicago, St. Paul & Milwaukee Railroad Company. This witness testified that the usual and customary manner of inspecting brakes on cars of this kind was to look up while standing on the ground at the end of the car and that if all the parts of the brake appeared to be in place and the brake did not appear to be bent in any way they would not make any closer inspection and that this was the way he inspected the brake on the car in question. The witness further testified that during his work as an inspector he had never found one of these tunnel brakes broken. The evidence on the part of defendant further tends to show that this manner of inspecting interchanged cars was the one in general use by all railroad companies. Defendant's evidence further showed that the tunnel brakes on cars of this kind are placed five feet and five inches above the end sill of the car and that the end sill is four feet and four inches above the ground, making the brake staff nine feet and nine inches from the ground, and that the brake wheel sets out from the end of the car nine and one-half inches. Mr. Donahue was introduced by plaintiff in rebuttal as an expert to testify to the manner or method in use throughout the country on the various roads with reference to inspecting interchanged cars of this kind that have end brakes. This witness testified as follows: "They get up to test them (tunnel brakes); get up on the cross-beam timber, that goes across the end of the car,

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Near v. Railroad.

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and twist them up to see that the chains, ratchet wheels, dogs and everything is in working order.”

Appellant contends that plaintiff failed to establish a case and that its demurrer offered  
**Evidence:** at the close of all the evidence should  
**Sufficiency:**  
**Demurrer.** have been sustained.

In passing upon the sufficiency of the evidence, challenged by demurrer, the general rule is that plaintiff's evidence (“if not impossible or opposed to the physics of the case or entirely beyond reason”) is taken as true and plaintiff is further entitled to the benefit of “every reasonable inference of fact arising on all the proof.” [Stauffer v. Railroad, 243 Mo. 305, l. c. 316.] But this does not relieve plaintiff of the necessity of producing substantial testimony to prove the issues involved. “A mere glimmer or spark, a mere *scintilla* will not do.” [Dutcher v. Railroad, 241 Mo. 137, l. c. 167.]

The negligence charged was that defendant negligently failed to properly inspect the brake.

Plaintiff's evidence tends to show that the brake in question was defective; that after it was broken, from one-third to two-thirds of the broken end had the appearance of an old break and the remainder had the appearance of a fresh break; that the break occurred near the place where the large brake wheel fastened onto the end of the brake staff; that the break was irregular, beginning one-fourth or one-sixteenth of an inch outside the socket of the brake wheel and extending a like distance down into the square portion of the staff covered by the wheel socket; that the old break appeared on the end of the broken portion which extended out of the socket; that the staff broke because of said defect while the brake was being applied by plaintiff, causing him to fall and receive his injuries.

**Negligence:**  
**Master and**  
**Servant: In-**  
**spection of**  
**Freight Cars.**

Under the circumstances it was the duty of defendant company to discover the dangerous defects in the cars and equipment received by it from other roads, if the defect was such as could have been discovered by the exercise of ordinary care upon its part. [Gutridge v. Railroad, 94 Mo. 468; same case on second appeal 105 Mo. 520.]

This brings us to the discussion of the vital question raised by this appeal, to-wit, was there substantial evidence tending to show or from which it could be reasonably inferred that the defect in question was one that could have been discovered by defendant by the exercise of ordinary care on its part?

It is impossible to lay down a rule of conduct which would serve as a test or measure in all cases in ascertaining whether ordinary care had been exercised. This because that which might be found to be the exercise of ordinary care in a given case, with its attending facts and surrounding circumstances, might be negligence when applied to the facts and circumstances in another case. We would be safe in saying, however, that the rule of ordinary care would not require that to be done which would not occur to a reasonably prudent man, under like or similar circumstances, as necessary to be done.

In the case of Gutridge v. Railroad, 105 Mo. 520, l. c. 526-7, it was said:

"We cannot formulate any rule of law fixing definitely the standard of ordinary care. Every attempt to do it has resulted in failure. What is ordinary care in one case, might be the grossest negligence in another. A mere glance at one handhold might indicate to an ordinary observer that it was safe, while, on the other hand, a glance might discover its defectiveness, and again the conditions might be such that ordinary prudence would suggest and require a careful scrutiny. We must not confound what the law re-

quires and what ordinary prudence requires. *In determining whether a master has been ordinarily prudent in the keeping of the appliances he has furnished his servants in repair, many circumstances must be considered. Their construction, the materials composing them, their age, the uses to which they are put and the dangers attending their use, with many other varying circumstances must all be taken into the account.*" (Italics ours.)

In the above case the fastenings of a handhold pulled out while the handhold was in the grasp of a brakeman. The handhold was fastened to the wooden part of the car by means of screws. After the screws pulled out it was discovered that the wood around the screws had become rotten by reason of its length of use and exposure to the weather. This rotten condition of the wood could not be seen by inspection with the eye before the accident occurred. The appellant in that case contended that the duty to exercise ordinary care required only an examination of the handhold with the eye and that since the defect was one that could not have been discovered by the eye the court should hold, as a matter of law, that the defect was one which could not have been discovered by the exercise of ordinary care. The court refused to sustain the above contention and held that the question was one for the jury, giving as reasons therefor the fact that defendant was charged with knowledge that wood, especially when under iron and exposed to the elements, would rot and the screws therein would thereby become loosened; that the screws had the appearance of being rusty and the wood the appearance of age and that under such circumstances "ordinary prudence requires a more careful examination than if the handhold was screwed down on an iron or other metal plate or was fastened by means of bolts and iron straps." [Id. 1. c. 527.] In other words in that case the very nature of the appliance when considered with the physics of

the attending circumstances, was such as would cause a reasonably prudent man to expect danger or trouble from that source unless it was given more careful attention than simply inspecting the appliance with the eye. But in the present case the situation appears to be materially different. Under the proof in the present case there is no showing or proof from which it could be reasonably inferred that a reasonably prudent man would be led to believe that he might expect trouble or danger from the brake in question and therefore such a condition as would call for a minute or close scrutiny of the brake. The defect existed in an iron bar which was between an inch and an inch and one-half in diameter. The break occurred within one-sixteenth or one-fourth of an inch of the place where the hub of the brake wheel extends perpendicularly half an inch from the staff with the radius of the brake wheel extending in each direction from the hub approximately eleven inches. On the car side of this defect the brace and brace socket encircled the staff at a distance of one-eighth or three-eighths of an inch from the socket of the brake wheel so that even if this defect had been visible upon the surface of the staff prior to the accident (a matter concerning which the evidence is entirely silent), yet it is difficult to conceive how the defect could have been seen, located as it was down in the crevice formed by the brace socket and the hub of the brake wheel, except that the brake wheel be removed and a very careful scrutiny had of the end of the staff.

Under the circumstances can it be said that ordinary care would require the removal of the brake wheel and a detailed inspection of the staff at the place where the defect was afterwards found to exist? After careful consideration of the matter, we have come to the conclusion that any inspection which would have revealed the defect in question would have been one measured by the rule of extraordinary care or the

highest degree of care as contradistinguished from ordinary care. The defendant was not required to exercise the highest degree of care and the law does not require the master to become an insurer of the safety of the servant.

In discussing a very analogous situation, the Supreme Court of Alabama, in the case of *Campbell v. Railroad*, 97 Ala. 147, 1. c. 153, said:

"If one brake should be taken apart and examined, all should; and if all, then every other machine or appliance connected with the train and composed of adjustable parts. To do this would cripple and embarrass the operation of the road beyond any requirement of the law. We are of opinion that such an inspection is an extraordinary duty, called into being only by some exigency which would suggest to the mind of a reasonably prudent person a necessity for its performance."

There is no showing made that defects of this kind are of frequent occurrence and that therefore an existing likelihood of expected danger from that source would cause a reasonably prudent man to examine carefully for the expected or anticipated danger. In fact all the evidence on this point was introduced by defendant and to the effect that they are unusual and in fact very rare, and that when the brake staff does become cracked or broken it is caused by its being struck by some object, which either causes the staff to break entirely off or leaves the staff in a bent condition, sufficient to give the car inspector a warning that the matter requires a more critical examination.

We do not say that the above evidence offered by defendant must be taken as true but it is mentioned to call attention to the fact that plaintiff's evidence wholly fails to establish the opposite and fails to supply substantial testimony from which the opposite could be reasonably inferred and therefore fails to show a situation which would call for such an inspec-



tion as would have revealed the defect in the present case. The burden was upon the plaintiff to prove the issues upon which he seeks a recovery. This duty to furnish proof cannot be aided by conjecture but the fact must appear from substantial evidence or from a reasonable inference arising therefrom.

Plaintiff contends that the inspection sheet furnished by the defendant to the Chicago, St. Paul & Milwaukee Railroad Company shows that the car was defective and that the defects were such as to put the inspector upon notice that the brake required a close examination. But reference to the defects mentioned in the inspection sheet discloses that the defects therein mentioned were upon parts of the car wholly disconnected and apart from the brake staff and were not such as to cause special attention to be directed to the brake.

Plaintiff introduced, as an expert, a witness who testified concerning the manner or method in general use by the various railroads of the country in inspecting brakes of this character. This witness testified that the method of inspection in general use was as follows: "They get up to test them, get up on the cross-beam timber that goes across the end of the car, and twist them up to see that the chains, ratchet wheel, dogs and everything is in working order." But it is very apparent from the present record that such an inspection or test of the brake in question would not have disclosed its defective condition. This is precisely what the plaintiff did while riding the car down the yard to its destination. He testified that while riding the car down the yards he tested the brake to see if it was in working order by turning the brake until he heard the brake shoes catch on the wheels and that "it sounded all right." The staff did not break until later when he applied the greater force necessary in setting the brake.

After due and careful consideration, commensurate with the importance of the case, we are unable to reach any other conclusion than that the facts of the situation, *as developed by the present record*, fail to show a situation from which the jury should be entitled to find or infer that the defect was not discovered because of the failure upon the part of defendant to exercise ordinary care, or in other words, the present record fails to show a situation from which it could be found or inferred that the defect in the brake would have been discovered had ordinary care under the circumstances been exercised.

The judgment is reversed and the cause remanded. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. *Walker, P. J.*, and *Brown, J.*, concur. *Faris, J.*, concurs in reversal but dissents as to remanding.

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BENJAMIN F. KINNEY v. METROPOLITAN  
STREET RAILWAY COMPANY, Appellant.

Division Two, July 14, 1914.

1. NEGLIGENCE: Contributory: Collision: Danger Signals: Question for Jury. On a dark, drizzly night the interurban trolley car on which plaintiff was motorman collided with a work car which stood between stations with no tail light burning. Another car was at the time from one to three car lengths beyond the work car and coming up, with headlight burning, on a parallel track eight or ten feet from that on which plaintiff's car was running. The window directly in front of plaintiff in the vestibule was closed, but that to his right was open. *Held*, that the question whether plaintiff was negligent in failing to see the work car was for the jury.

2. ———: ———: ———: ———: Custom: Evidence: Pleading.  
Where the petition charges common-law negligence in an action by a motorman for injuries received in a rear-end collision, and alleges that the car with which his collided was without rear lights, evidence of a rule and custom of the company to keep a red signal light on the rear of cars at night is admissible, even though such rule and custom be not pleaded.
3. VOIR DIRE: Attorney for Casualty Company: Not Record Party.  
Where an attorney for a casualty company was in court ostensibly as counsel for the defendant, and making a defense which was really in behalf of his company, not a record party to the suit, it was not improper for plaintiff's counsel to ask jurors on their *voir dire* if they were connected in a business way with the casualty company.
4. NEGLIGENCE: Loss of Leg: Improper Remarks of Counsel: Verdict: Remittitur. The plaintiff, a motorman employed by defendant, lost a leg as a result of a rear-end collision with a car which he alleges burned no signal lights behind. His petition asked for \$50,000 damages, and an instruction authorized the jury, if they should find for him, to assess the damages at "not to exceed" that sum. Defendant's employees fully supported the plaintiff as to the facts of defendant's negligence. Plaintiff's counsel in his argument asked the jury to imagine as plaintiff a female passenger on the car, and when an objection was sustained to that he turned to picture plaintiff's battle with defendant's legal department and claim agents. An objection to that was overruled, and then counsel, until stopped by the court, argued about the objections, once stigmatizing them as "tricks of the trade." The jury returned a verdict for \$20,000, and judgment was entered for \$15,000 after compulsory remittitur of \$5000. *Held*, that, although the conduct of plaintiff's counsel was most reprehensible, yet, since it seems plaintiff would have had a verdict in any event, it is not reversible error; but in view of the fact that the court has hitherto refused to affirm judgments for more than \$10,000 for the loss of a leg, counsel's misconduct affords ground for requiring a further remittitur for \$5000.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield*, Judge.

AFFIRMED (*conditionally*).

*John H. Lucas, Boyle & Howell, Jos. S. Brooks, Chas. N. Sadler and M. T. Prewitt* for appellant.

(1) The court erred in overruling defendant's instruction in the nature of a demurrer to the evidence at the close of the evidence. *Williams v. Railroad*, 149 Mo. App. 489; *Koenig v. Railroad*, 173 Mo. 698; *Klockenbrink v. Railroad*, 172 Mo. 678; *Moore v. Railroad*, 194 Mo. 1; *Eppstein v. Railroad*, 197 Mo. 720; *Murrell v. Railroad*, 105 Mo. App. 88; *Abbott v. Railroad*, 121 Mo. App. 582; *Brody v. Railroad*, 206 Mo. 509; *Moore v. Railroad*, 146 Mo. 582; 1 *Bailey on Personal Injuries*, sec. 1121. (2) The court erred in admitting incompetent, irrelevant and immaterial evidence offered by plaintiff. *Fechley v. Railroad*, 119 Mo. App. 372; *Mooney v. Kennett*, 19 Mo. 555; *Bailey v. Kansas City*, 189 Mo. 514; *Tarkio v. Lloyd*, 179 Mo. 605; *St. Louis v. Roche*, 128 Mo. 541; *Crone v. Malinkrodt*, 9 Mo. App. 316; *Keane v. Klausman*, 21 Mo. App. 489. (3) The verdict of the jury is excessive. *Farrar v. Railroad*, 155 S. W. 444; *Brody v. Railroad*, 206 Mo. 540; *Newcomb v. Railroad*, 182 Mo. 727; *Scrivner v. Railroad*, 260 Mo. 421. (4) The court erred in permitting attorney for plaintiff to improperly examine jurors on *voir dire*, and permitted said attorney to make improper remarks before the jury in the closing argument. (5) The court erred in overruling appellant's motion for a new trial. The verdict of the jury is excessive, and evidences passion and prejudice on the part of the triers of the fact. *Lehnick v. Railroad*, 118 Mo. App. 616; *Spohn v. Railroad*, 87 Mo. 84; *Price v. Evans*, 49 Mo. 336; *Fugler v. Bothe*, 117 Mo. 502; *Waddell v. Railroad*, 111 S. W. 542; *Briscoe v. Railroad*, 120 S. W. 1162; *Wellman v. Railroad*, 219 Mo. 126. (6) The court erred in giving instruction 2-p, on behalf of the plaintiff, in this: (a) The court refers the jury to the petition sued on for the injuries suffered by plaintiff. (b) It tells the jury that they may assess his damages at such an amount as they find will compensate him for his injuries so received, such injuries not being speci-

fied in the instruction. (c) It tells the jury they may take into consideration physical and mental anguish "sued for in this case," and then tells the jury that they may find for the plaintiff in such sum as will fairly compensate him for his injuries, it being alleged in the petition that plaintiff had been compelled to expend and became liable for seven hundred and fifty dollars for doctor's bills, medicines, etc. *Hawes v. Stockyards Co.*, 103 Mo. 66; *McGowan v. Store Co.*, 109 Mo. 578; *Pandjiris v. Hartman*, 196 Mo. 547; *State v. Scott*, 109 Mo. 231; *Shaw v. Dairy Co.*, 56 Mo. App. 521; *Grant v. Railroad*, 25 Mo. App. 227; *Schaub v. Railroad*, 106 Mo. 74.

*Brewster, Kelly, Brewster & Buchholz* for respondent.

(1) The court did not err in overruling defendant's demurrer to the evidence. *Theobold v. Transit Co.*, 191 Mo. 432; *Trigg v. Water, Light & Transit Co.*, 215 Mo. 543; *Petty v. Railroad*, 179 Mo. 674; *Carter v. McDermott*, 29 Mo. App. Cas. (D. C.) 145; 10 Am. & Eng. Ann. Cas. 601. (2) The evidence offered was competent and proper, and in support of the allegations of the petition. *Campbell v. Railroad*, 175 Mo. 175; *Lancaster v. Railroad*, 143 Mo. App. 172; *Bragg v. Railroad*, 192 Mo. 350; *Lee v. Railroad*, 195 Mo. 425; *Ahlfeldt v. Mexico*, 129 Mo. App. 199; *Lewis v. Railroad*, 142 Mo. App. 585; *Canfield v. Railroad*, 98 Ill. App. 1. (3) The verdict was not excessive, and the final judgment of \$15,000 should not be further reduced. *Oglesby v. Railroad*, 150 Mo. 137; *Corby v. Telephone Co.*, 231 Mo. 417; *Yost v. Railroad*, 245 Mo. 219; *Thompson v. Lumber Co.*, 147 S. W. (Tex.) 296; *Railroad v. Spurney*, 197 Ill. 471; *Railroad v. Dunn*, 106 Ill. App. 194; *Light Co. v. Rombold*, 68 Neb. 54; *Kalfur v. Railroad*, 161 N. Y. 660; *Williamson v. Railroad*, 65 N. Y. Supp. 1054; *Railroad v. Scott*, 21 Tex.

Civ. App. 24; Railroad v. Abbey, 29 Tex. App. 211; Railroad v. Tolliver, 37 Tex. Civ. App. 437; Hollenbeck v. Railroad, 141 Mo. 97; Shohoney v. Railroad, 231 Mo. 131. (4) The court did not err in permitting the questions asked the jury on *voir dire*. Meyer v. Mfg. Co., 67 Mo. App. 389. (5) The court did not err in overruling defendant's motion for a new trial. The verdict was not so large as to indicate passion or prejudice on the part of the jury. Cases under point 3; Cook v. Globe-Democrat, 227 Mo. 471. (6) The court did not err in giving instruction 2 on behalf of plaintiff. Corrister v. Railroad, 25 Mo. App. 627; Kain v. Railroad, 29 Mo. App. 62; Britton v. St. Louis, 120 Mo. 444; Allen v. Springfield, 61 Mo. App. 273; Sherwood v. Railroad, 132 Mo. 345; Taylor v. Iron Co., 133 Mo. 363; Hartpence v. Rogers, 143 Mo. 633; Dwyer v. Transit Co., 108 Mo. App. 162; Lead Co. v. Railroad, 123 Mo. App. 408; Robertson v. Railroad, 152 Mo. 389.

ROY, C.—Action for damages for personal injuries. Verdict for \$20,000. There was a compulsory remittitur of \$500, and a judgment for \$15,000, from which the defendant has appealed. Plaintiff's age is not shown. He has a wife but no children. He testified that he had lived in Kansas City twenty-five or thirty years, and had been in the service of the defendant about five years as a motorman. He stated that he was experienced in that work. He was acting as a motorman on defendant's car No. 123 at the time of the alleged injury at about 9:40 p. m., June 11, 1909. His car was going east on the defendant's line from Kansas City to Independence. The place of the accident was in the country, about one hundred feet west from Tullis station, and three or four hundred feet east of Smalley station. It is a double track; the south track was used for cars bound eastward, and the north track for westbound cars. Those tracks

were eight or ten feet apart. They were straight from Smalley to Tullis and then curved to the northward; there was a moderate upgrade. Beaumont station was a distance of two short blocks eastward from Tullis. There was a cluster of ordinary incandescent lights on the trolley pole at Tullis. The evidence is conflicting as to whether they were burning. Plaintiff testified that they were not. One witness for defendant stated that they were. Plaintiff's car No. 123 was an ordinary trolley car with the usual vestibule enclosed in front with sheet-iron waist high to the motorman as he sat on his stool. The windows of the vestibule had three sashes which opened by being dropped. The center and left sashes were up and closed. The right hand sash was down and opened. There was an ordinary incandescent light, and also an arc light called a "headlight," attached to the front of the vestibule of plaintiff's car. The arc light had a reflector to throw the light ahead along the track.

The injury was caused by a collision between plaintiff's car and a "work-car," sometimes called the "mogul." That car was an ordinary box car fitted with a motor, controller and vestibules similar to those on plaintiff's car. There were doors in each end and also in the middle of both sides. There were windows on both sides, one near each end, but none in the end. There were five sixteen-candle incandescent lights in a row in the center of the roof inside the car. It had an arc headlight.

Two witnesses for the defendant stated that the car extended six inches above the end door, but plaintiff testified that it was about eighteen inches above the end door. There were two lanterns lighted and sitting inside of the car on the floor. That car was in charge of Wilbur F. King, who acted as motorman, and with him were Jennings and Walters. That car had preceded plaintiff's car on the same track. There is no evidence showing that plaintiff was aware of its

presence ahead of him. Plaintiff's car was going at ten miles an hour, and he testified that the car could have been stopped in seventy or eighty feet. Defendant's evidence was to the effect that it could have been stopped within thirty or forty feet. The work car stopped at the place of accident for the purpose of unloading tools and material for track repairs. There was no red light or light of any kind on the rear end of the work car. The rule and custom of defendant required a red light on the rear of all cars at night as a danger signal. The evidence as to such rule and custom was objected to by defendant on the ground that such rule and custom were not pleaded. The objection was overruled.

King testified that he could give no excuse for the absence of that red light. At the trial it was a contested question as to whether the rear door of the work car was open at the time of the accident and as to whether the lights in that car were then visible to the plaintiff. The plaintiff testified that no lights of any kind were visible on the work car or in it either before or after the collision.

Plaintiff's witness Diamond, a passenger on plaintiff's car, stated that from the inside of the car he could see nothing ahead on account of darkness. Mr. Roberts, another passenger, witness for plaintiff, testified that after the accident he went out of the car and forward so that he stood by the side of plaintiff's car near the front end and saw what appeared to be reflected lights in the work car.

Jennings, one of the crew of the work car and witness for the defendant, said that after the car stopped he was standing leaning out of the door on the north side, looking back at plaintiff's car, which at first was about two blocks away, and said that he supposed it would stop and not run into the work car. That when it got fifty or seventy-five feet away he hallooed, "Look out, the car is going to hit us," and



jumped; that Walters was in the west end of the work car, and ran out of the west door with a lantern and got off the car.

King testified that he heard Jennings cry out, and, looking forward, saw the headlight of plaintiff's car through the door of the work car and that the collision immediately followed.

One Sproul, a passenger, testified for the defendant, stating that he was chewing tobacco and that between Smalley and the place of the accident he twice put his head out of the window to spit and saw the light in the work car a block ahead. The evidence shows that it was raining at the time of the collision; there was water upon the windows of the vestibule. The testimony for both sides was to the effect that rain on the windows and on the glass of the headlight served to obscure the vision and light.

King testified:

"Did you have your windows open or closed in front of you? A. I had it open. I started with it closed but I afterwards dropped it.

"Q. After you dropped it did you have any difficulty in running your car on account of the rain? A. No, sir.

"Q. Why did you drop it? A. Because the heavy mist that was falling gathered on the glass.

"Q. Could you have let down one on the side. Did you have a side window that you could let down next to the front window? A. Yes, sir, they were there but they were down when I had started.

"Q. They were down to start with? A. Yes, sir.

"Q. Now, do you know whether or not the window in the front of No. 123 could be let down the same as yours? A. Yes, sir, that could be let down."

Mr. Ward, the conductor of plaintiff's car, testified for defendant: "Q. When there was water on the windows so that you could not see through them what was the proper thing to do under those circum-

stances? A. If you could not keep your glass clean in front of you so that you could see through it, the proper way would be to put the window down to the side of you, or if you could not see that way, the one to the front of you. It has been the custom, most all the boys do that."

The plaintiff did not testify as to whether he looked through the open window on the right hand side of the vestibule or through the closed window in front of him. He testified that he was looking constantly straight ahead of him, and that as he left Smalley he saw the headlight of a westbound car at Beaumont, and that such car was from one to four car lengths east of the work car when the collision occurred. The other evidence corroborated his statement as to the westbound car.

Plaintiff testified that he did not see the work car until he was within fifteen or twenty feet of it and that he then threw off the power and threw on the emergency brake, but the collision followed so quickly that his foot was caught and crushed, requiring amputation about five inches below the knee. He was seven weeks in the hospital. The leg heals at times and then breaks out again. The surgeon testified that another operation would be necessary to make the wound heal and prepare the leg for an artificial limb. He was out of employment for about a year. The week before the trial he began work as a night watchman for the city at a salary not shown. He was earning \$70 or \$75 a month when hurt.

The negligence of defendant and plaintiff's injuries were alleged in the petition as follows:

"That on the eleventh day of June, 1909, at about 9:38 o'clock p. m. of said day, this plaintiff acting in his capacity as motorman as aforesaid, was running said car from Kansas City, Missouri, to Independence, Missouri.

“That at said time of night it was very dark and raining and by reason thereof it was impossible for this plaintiff to see any object on said track at any distance from his car unless said object was equipped with lights or illuminated in such manner as to give this plaintiff a warning and notice that said object was on the track.

“That at said time the defendant carelessly and negligently caused, suffered and permitted its work car, commonly known and hereinafter designated as a mogul car, to remain on said track in front of the car which this plaintiff was operating, without having any lights or illuminations of any kind thereon to warn this plaintiff or give him notice of the danger to which he was subjected by reason of said mogul car being on said track.

“That at said time on said day, this plaintiff was operating his car at the usual and ordinary rate of speed and when said car as operated by this plaintiff arrived at a point between Smalley avenue and Beaumont stations it collided violently with said mogul car, as said mogul car was standing on said track as aforesaid.

“That said collision was caused wholly by reason of the carelessness and negligence of the defendant in causing and allowing said mogul car to stand on said track at said place, without any lights or illuminations being placed on said mogul car and without warning this plaintiff in any manner of the existence of said mogul car on said track at said place.

“That when said car so operated by this plaintiff collided with said mogul car as aforesaid, the front vestibule of the car operated by this plaintiff was crushed and mashed in, in such a manner that this plaintiff's foot and limb were mashed, bruised, lacerated and injured to such an extent that it became necessary for plaintiff's right foot and limb to be amputated at a point about four inches below the knee,

and at said time and place by reason of negligence of the defendant as aforesaid, this plaintiff received a cut over the eye and on his nose and this plaintiff's body was bruised, crushed and injured, and by reason of the injuries which this plaintiff received at said time and place, and caused by negligence of defendant as aforesaid, this plaintiff has been rendered a cripple for life, and by reason of said injuries this plaintiff has suffered great bodily pain and mental anguish in the past and will continue to so suffer for the remainder of his life; and plaintiff says that before he received said injuries he was a stout and able-bodied man and able to work and earn five dollars per day as result of his labors, but since he received said injuries and by reason thereof, that plaintiff has not been able to and has not performed work or labor of any kind and this plaintiff says that by reason of the premises his capacity and ability to work and earn wages have been greatly diminished for the remainder of his life and so by reason of the carelessness and negligence of the defendant as aforesaid, this plaintiff has lost and will lose the wages which he would have been able to earn had he not been injured by the wrongful carelessness and negligent acts of the defendant as aforesaid.

"And this plaintiff says that by reason of the premises he has been compelled to expend and become liable for doctor's bills, for medicine, for surgeons, for hospital bills and for nurse hire in the sum of seven hundred fifty dollars, and plaintiff says that by reason of the premises he has been damaged in the sum of fifty thousand dollars."

The answer was a general denial and a plea of contributory negligence.

During the examination of the jurors on their *voir dire*, plaintiff's counsel asked if any one of the panel was connected in a business way with the American Fidelity & Accident Insurance Company. To

which counsel for defendant objected and asked that the jury be discharged. The objection was overruled.

The supplemental motion for a new trial contains the following: "Because in examining the panel of jurymen preparatory to making the challenges and selecting the twelve jurymen to try the cause, the court over the objections of the defendant permitted Mr. Brewster, attorney for the plaintiff, to ask the jurymen on their *voir dire* the following question: 'Is any gentleman on the panel an officer or connected in a business way with the American Fidelity and Accident Insurance Company?' To which ruling of the court the defendant then and there excepted and asked that the jury be discharged, which exception, objection and motion to discharge the jury was overruled; that said case was being defended by the American Fidelity and Accident Company, being then and there represented by Mr. Chas. M. Howell, the above question was asked for the purpose of informing the jury and calling attention of the jury to the fact that the case was being defended by an accident insurance company, which would be liable to pay any judgment obtained in the case, and was prejudicial to the defendant."

Among the instructions the court gave the following for the plaintiff:

"2P. The court instructs the jury that if you find for the plaintiff you may in assessing his damages take into consideration the nature and extent of plaintiff's injuries, if any, sued for in this case, and the jury may further take into consideration whether or not said injuries, if any, are of a permanent character. The jury may also take into consideration such physical pain and mental anguish, if any, as you find and believe from the evidence plaintiff will suffer in the future on account of said injuries, if any, sued for in this case, and you may assess his damages at such an amount as you find and believe from the evi-

dence will fairly compensate him for his injuries, if any, so received, not to exceed the sum of fifty thousand dollars."

During the argument of counsel for plaintiff to the jury the following occurred:

"I ask you, gentlemen of the jury, this question. Suppose that instead of Mr. Kinney being the plaintiff in this case, the woman who was a passenger on that car was the plaintiff here; and suppose that it was shown, as it has been shown here, that there were no lights on the back end of the mogul car, and that it stopped dead on that track and that it was a rainy, dark, drizzling night, and that the car upon which Kinney was riding ran into that car and that woman's limb was cut off, what would your verdict be in that case? And gentlemen of the jury, let me ask you, if that was the case here, that Judge Johnson was defending, can't you hear—can't you hear the defendant's witnesses coming on the stand and saying that you could not stop one of these cars within 250 feet?

"Mr. Howell: I object to that because under the law the measure of negligence is different and therefore that argument is improper.

"Mr. R. R. Brewster: I say it is different, and I will tell you where it is different. They were bound to exercise, as to a passenger—

"Mr. Howell (interrupting): I object to any argument along that line. My objection is that it is different, and improper to argue it.

"Mr. R. R. Brewster: I will withdraw it, but I want to say this—

"The Court (interrupting): The objection will be sustained.

"Mr. Johnson: I ask your Honor to censure the counsel for making that kind of argument to the jury.

"Mr. Brewster: And I ask you to, if I am in the wrong.

"Mr. Johnson: The Court said you were in the wrong.

"The Court: The arguments will be withdrawn from the consideration of the jury and the jury will not consider them in arriving at their verdict. . . .

"Mr. Brewster: I don't know how you feel about it, but here is the plaintiff, who is in the employ of the defendant, their trusted employee, who went about driving this great car, in whose charge they put the lives and limbs of your fellow-citizens, and here he is injured in the performance of his duty; here he is maimed and crippled as he stood at his post, and they are not saying to Kinney, 'You were injured through the negligence of this company and we will gladly pay you for it,' but they are saying, 'Come into court and fight us; fight all our combined power which we have at our command; fight our claim agents, fight our legal department, fight us through the courts and then if you can recover for your crippled leg you can have the money.'

"Mr. Howell: I object to that, because the argument is offered only for the purpose of prejudicing the jury and not the argument of any facts in this case.

"The Court. Objection overruled.

"To which ruling and action of the court the defendant then and there at the time duly excepted and still excepts.

"Mr. Brewster: I am not going to let these interruptions interfere with the argument in this case, and you are not going to let them interfere with your mind in following the argument in this case. You perhaps know something of the tricks of the trade—

"Mr. Howell (interrupting): I object to that. I am making proper and legal objections here, all but one of which have been sustained by the court, and I object to the attorney arguing against my objections.

"Mr. Brewster: I am talking about the last objection, which was overruled by the court, and which was not a proper objection and which I say was made—

"Mr. Howell: I object to the counsel arguing about my making objections and criticising me for making objections, calling it tricks of the trade, etc. If the attorney will get within the record a little while we will get along better. I want to know what the ruling of the court is on this last objection.

"Mr. Brewster: I would like to know.

"Mr. A. W. Brewster: I would like to know what the objection is?

"The Court: The objection is overruled. I will ask you to be very careful to keep within the record.

"To which ruling and action of the court the defendant then and there at the time duly excepted and still excepts.

"Mr. R. B. Brewster: I will say there were two objections that at least were wrong or the court would not have overruled them, and I will say that I wouldn't let them interfere—

"Mr. Howell (interrupting): I object to him arguing about the rulings on objections either way, whether sustained or overruled. It is not a matter of argument to the jury, that is my point.

"The Court: Don't argue any further about objections."

I. Appellant has briefed this case on the theory that it was the duty of plaintiff to run his car slow enough so that it would be possible for  
**Negligence:** him to see any obstruction on the track  
**Contributory:** in time to stop before striking it,  
**Evidence:** even though such obstruction had no  
**Question for Jury.** light or danger signal on it. We leave that question undecided for the reason that the fact is conceded that there was the ordinary arc headlight on plaintiff's



car. We will take it for granted that had plaintiff been looking through the open window on his right, and had there been no headlight of a westbound car in front of him, he could have seen the work car in time to have stopped before striking it. In other words, he could have seen the work car at the distance of eighty feet, that being the distance within which plaintiff testified that he could stop his car under the circumstances. Had there been no rain on the glass and no headlight of the westbound car in front of him, the plaintiff by looking through the glass in front of him, could have seen the work car at the distance of more than eighty feet. Under such circumstances it would have been contributory negligence in him to fail to see the work car. We do not undertake to decide whether, had there been no glare on the headlight coming toward him, the plaintiff would have been guilty of contributory negligence in failing to look through the open window on his right and thus avoid the obscuring effect of the rain on the glass in front of him. It is an unquestioned fact that the westbound car was, at the unlucky moment, coming westward from one to four car lengths east of the work car. It needs no testimony of witnesses to establish in court the confusing effects of such a headlight on one just in front of it or nearly so. At times it utterly obscures all objects not in the direct line between the observer and the light. No one, however, would claim that two trains of cars with locomotives should, when passing on parallel tracks, slacken their speed because of the confusing effects of the headlights. Nor should street cars do so under ordinary circumstances. Plaintiff was not required to slacken his speed because of the car coming in the opposite direction. We hold that it was a question for the jury whether, in the absence of the red light on the work car, and in the rain, with the glare of the headlight in his face, it was negligence in the

plaintiff to fail to see the work car. When different inferences may be drawn from undisputed facts, the question of negligence should be submitted to the jury. [Paden v. Van Blarcom, 181 Mo. l. c. 128; Powers v. Transit Co., 202 Mo. l. c. 280.]

<b>Custom not Pleaded: Evidence Admitted.</b>	<b>II. It was not error to admit evidence of the rule and custom of defendant to keep a red light as a danger signal on the rear end of its cars at night, though such rule and custom were not pleaded.</b>
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Thompson on Negligence, vol. 1, sec. 420, holds that evidence as to a custom is admitted on the question of ordinary care. It was said by this court in Bailey v. Kansas City, 189 Mo. l. c. 514: "If a cause of action is based directly on a violation of a duty imposed alone by a municipal ordinance, the pleading should set forth the specific ordinance in hand, because courts will not take judicial notice of its existence. [City of Tarkio v. Loyd, 179 Mo. l. c. 605; Inhabitants of Butler v. Robinson, 75 Mo. 192.] But if an ordinance of a city is used as a mere matter of evidence, no good reason is perceived why it should be pleaded; for to plead evidential facts is bad, and, on principle, the rule applies to ordinances. [Robertson v. Railroad, 84 Mo. l. c. 121; Danker v. Goodwin Mfg. Co., 102 Mo. App. l. c. 731.] Now, the case under the fourth amended petition is not based on the violation of a municipal ordinance, but is based on the violation of a duty imposed by general law. Therefore the objection in the form made was properly overruled."

The petition charges common-law negligence. The existence of the custom was merely an evidentiary fact tending to show lack of ordinary care on the part of defendant. It was not necessary to plead such evidentiary fact.

III. Complaint is made of the action of plaintiff's counsel in asking the jurors on their *voir dire* whether they were connected in a business way with the American Fidelity & Casualty Insurance Company. Mr. Howell, the attorney for the company, was in court ostensibly as counsel for the defendant, making a defense which was really in behalf of his company which was not a party to the suit on the record. It is claimed that it was an injustice to the accident insurance company to call the attention of the jury to the fact that it was making a defense and was liable to pay any judgment that might be rendered in the case. It was held in *Meyer v. Mfg. Co.*, 67 Mo. App. 389, that such an inquiry was proper.

IV. Exception is taken to the conduct of the plaintiff's counsel in his argument to the jury. We have carefully gone through the record in order to assemble all the facts bearing on that question, in order that it may be comprehensively decided. The employees of defendant fully supported the plaintiff as to the facts of defendant's negligence. They testified that the rules and custom of the defendant required a red light as a danger signal on the rear end of all cars at night. They testified as to the absence of such danger signal. The one in charge of the work car testified that he could give no excuse for its absence. These employees testified that it was raining, and that rain on the window glass obscured the vision. Only one witness for defendant was criticised by plaintiff's counsel, or subject to criticism. That was Sproul, who was not an employee of defendant. His evidence as to seeing a light in the work car as he looked ahead about a block was to some extent corroborated by Roberts, plaintiff's witness, who testified that after the accident, standing behind the

Improper  
Remarks of  
Counsel: Verdict:  
Loss of Leg:  
Remittitur.

work car and by the side of the front end of plaintiff's car, he could see a reflected light in the work car. There is an utter absence of anything tending to show that defendant did anything in connection with the trial that was not clean and legitimate.

This court has repeatedly refused to sanction a judgment for more than \$10,000 for the loss of a leg. [Farrar v. Railroad, 249 Mo. 210; Brady v. Railroad, 206 Mo. 509; Newcomb v. Railroad, 182 Mo. 701.] In the latter case \$762 was allowed for the surgeon's bill in addition to the \$10,000. We are not now holding that in no case could a judgment for more than \$10,000 for the loss of a leg be upheld. In this case the plaintiff's petition asks for \$50,000. The plaintiff's instruction to the jury was to assess the damages in accordance with that instruction at not exceeding \$50,000.

In Lessenden v. Railroad, 238 Mo. l. c. 265, VAL LIANT, C. J., speaking of the Partello case, 217 Mo. 645, in which there was an instruction authorizing the recovery of not exceeding \$50,000, said: "Yet the trial judge gave that instruction after he had heard the evidence in the case. He doubtless labored under the erroneous impression that it would have been error to have refused it. But whilst the long practice authorizes the giving of such an instruction, and therefore it is not reversible error to do so when counsel ask it, yet when the jury return their verdict and the question of excessive damages arises, the probable effect of the instruction with its particular wording will be taken into account."

In Applegate v. Railroad, 252 Mo. l. c. 202, it was said: "That form of instruction, whilst it has been held not reversible error, has been criticised as a judicial *hint* that the court would approve a verdict in the sum mentioned in the petition."

With the petition calling for \$50,000, and with an instruction authorizing it, in spite of the lower stand-

ard set by this court, plaintiff's counsel in his argument introduced into the case in place of plaintiff an imaginary woman passenger. When called to order on the objection of defendant, he proceeded to prejudice the jury against defendant's "claim agents." It is natural that juries are influenced by the sufferings and afflictions of the victims of such accidents. That is a fact in nature of which the plaintiff's counsel has a right to take advantage in argument. The defendant must endure it, however severely it may affect its interests. But such fact in itself furnishes a special reason why false and unjust prejudice should not be stirred in the feelings of the jury against the defendant.

The conduct of counsel for the plaintiff in this case was most reprehensible. What can be said in defense of a lawyer who causes a party to be summoned into court and then proceeds to treat him as if he had no rights which a court of justice is bound to respect? After the worst is said about the defendant, it still remains a fact that its conduct in the preparation and trial of this cause was a model of propriety and fairness as compared with the methods of plaintiff's counsel. It is our duty, however, not to be swept away by our indignation at such conduct. We believe that, under the evidence in this cause, a verdict for the plaintiff would have resulted in any event. Such being the case, the conduct of plaintiff's counsel is not reversible error, as it would have been in a close case. This court has hitherto refused to affirm judgments for damages for more than \$10,000 for the loss of a leg. [Farrar v. Railroad, 249 Mo. l. c. 227; Brady v. Railroad, 206 Mo. l. c. 540; Newcomb v. Railroad, 182 Mo. l. c. 727.] We do not hold that in no case should the judgment exceed that amount; but we do hold that a verdict following such misconduct of counsel for plaintiff will not be allowed to stand for more than that amount. If the plaintiff

will, within ten days, enter a remittitur of \$5000 as of the date of the judgment in the trial court, the judgment will be affirmed for \$10,000 and interest at six per cent from the date of the judgment; otherwise it will be reversed and the cause remanded for a new trial. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

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DANIEL ABRAMSKY v. PAULINE ABRAMSKY,  
Appellant.

Division Two, July 14, 1914.

1. **APPEAL: Appointment of Receiver: Demurrer to Petition.** No appeal lies in the middle of a case, for instance, from a holding that a petition praying for the appointment of a receiver is good on demurrer, without final judgment; but an appeal from the overruling of a motion to revoke an order appointing a receiver, filed after a demurrer to the petition was overruled, asking that said order be revoked, for the reason, among others, that the petition did not state facts sufficient to constitute a cause of action, incidentally involves the sufficiency of the petition, since, if the petition states no cause of action, there was no basis for the court's action in appointing the receiver, and appellant's motion to vacate the order should have been sustained.
2. **RECEIVER: Fitness: Motion to Vacate: Supported by Affidavits.** Where there is no competent proof of the bias or partiality or other unfitness of the person appointed a receiver, the defendant's motion to vacate the order appointing him on the ground that he is prejudiced and hostile to defendant, should be overruled, although the proof heard on the motion was in the form of affidavits, and whether or not that was the correct method of proof where both sides resorted to it.
3. **———: Appointment: Discretion of Court.** Sec. 2018, R. S. 1909, saying that a circuit court may appoint a receiver "whenever such appointment shall be deemed necessary,"

vests in the judge a discretion so broad as to be a matter of review on appeal only in case of palpable abuse thereof.

4. **HUSBAND AND WIFE: Suit by One Against Other.** The husband may sue the wife either at law or in equity, the same as if she were a *feme sole*; for instance, he may bring suit for the appointment of a receiver to take charge of and administer real estate conveyed to both as an estate by the entirety.
5. ———: **Receiver: Appointment: Estate by the Entirety.** Where lots were conveyed to a husband and wife, thereby creating an estate by the entirety, and a mortgage was placed thereon by them to secure the payment of money borrowed for the construction of a building thereon, and the wife has ousted the husband from all control of the property and has collected and appropriated the rents, and failed and refused to apply any of the rents to the payment of the debt, and proceedings for foreclosure of the mortgage have been begun, the circuit court has power, upon the husband's suit against the wife alone, to compel an accounting, and to appoint a receiver to take charge of the property and rent the same and collect the rents; and if there is nothing in the facts to indicate that the court has abused its sound discretion, a motion to revoke the order appointing the receiver will not be sustained on appeal.

Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock*, Judge.

**AFFIRMED.**

*George B. Webtser* and *William J. Grodski* for appellant.

(1) The second amended petition is wholly without equity. (a) It showed that the plaintiff had no right to the exclusive possession of the premises, or the exclusive use of the rents. 1 *Tiffany*, Real Prop., p. 381; 2 *Jones*, Real Prop., sec. 1791; 1 *Washburn*, Real Prop. (6 Ed.), sec. 915; 1 *Pingree*, Real Prop., p. 720; *Hilles v. Fisher*, 144 N. Y. 306; *Branch v. Polk*, 61 Ark. 393; *Buttler v. Rosenblath*, 42 N. J. Eq. 651; *Shinn v. Shinn*, 42 Kan. 1; *Corinth v. Emery*, 63 Vt. 505; *Chandler v. Cheney*, 37 Ind. 391; *McCurdy v. Cummings*, 64 Pa. St. 41. (b) It showed that the

plaintiff had adequate remedy by action at law. *O'Day v. Meadows*, 194 Mo. 588; *Grimes v. Reynolds*, 184 Mo. 679; *Rice-Stix & Co. v. Sally*, 176 Mo. 107; *Bank v. Hageluken*, 165 Mo. 443; *Montgomery v. Montgomery*, 142 Mo. App. 481; *Hurt v. Cook*, 151 Mo. 416; *Winn v. Riley*, 151 Mo. 61; *High, Receivers* (4 Ed.), sec. 741. (c) It failed to state a case for accounting in equity. *Sommerville v. Helman*, 210 Mo. 567; *Vogelsang v. Wood Fibre P. Co.*, 147 Mo. App. 578; *Atilla M. Co. v. Winchester*, 102 Ala. 184; *Badger v. McNamara*, 123 Mass. 117; *McCulla v. Beadleston*, 17 R. I. 20; *Lathan v. Harby*, 50 S. C. 428; *Padwick v. Hurst*, 23 L. J. Ch. 657; *Phillips v. Phillips*, 9 Hare, 471; 3 *Daniel, Chan. Pl. & Pr.* 1929, n. 1. (d) It stated no case for discovery in equity, that ground of jurisdiction having been disposed of by our statutes on depositions. *Tyson v. Farm & Home Assn.*, 156 Mo. 594; *Vogelsang v. Wood Fibre P. Co.*, 147 Mo. App. 578. (e) It stated no case in equity on the theory of a fiduciary relation between the parties, since in a case where the only substantial injury is financial loss, there is no ground for the interference of equity and the consequent denial of trial by jury. *Van Raalte v. Epstein*, 202 Mo. 173; *Baum v. Stephenson*, 133 Mo. App. 187; *Lee v. Conran*, 213 Mo. 404; *R. S. Mo.*, 1909, sec. 1968; *State v. Aloe*, 152 Mo. 479; *High, Receivers* (4 Ed.), sec. 603; 1 *Pomeroy, Eq. Jr.* (3 Ed.), sec. 178. (2) The second amended petition states no ground for the appointment of a receiver. *Vaughn v. Vincent*, 88 N. C. 116; *Heinze v. Kleinschmidt*, 25 Mont. 89; *Cassety v. Capps*, 3 Tenn. Ch. 524; *Lemaster v. Elliott*, 53 Neb. 424; *Ketcham v. Provost*, 132 N. Y. S. 120; *High, Receivers* (4 Ed.), secs. 554, 555; *Alderson, Receivers*, pp. 568, 569. On the concrete case the appointment of a receiver was erroneous. *McClure v. McGee*, 32 Ky. L. R. 1318; *Niehaus v. Niehaus*, 125 N. Y. S. 1071. The sole object of this proceeding is the appointment of a receiver, which is only granted



as ancillary to some other relief in circumstances of an equitable nature. An appointment should not be made where it is the sole purpose of the litigation and no independent ground for equitable relief is shown. *State ex rel. v. Ross*, 122 Mo. 435; *In re French Bank*, 53 Cal. 495; *Nabon v. Ongley El. Co.*, 156 N. Y. 196; *Slover v. Coal Creek Co.*, 113 Tenn. 421; *Baltimore B. House v. St. Clair*, 58 W. Va. 565; *Harwell v. Potts*, 80 Ala. 70; *Zuber v. Micmac G. M. Co.*, 180 Fed. 625.

*David Goldsmith* for respondent.

(1) The amended petition states a cause of action of equitable cognizance, because the action is one between husband and wife. 10 Ency. Pl. & P., p. 195, subject "Husband and Wife;" *Porter v. Bank*, 19 Vt. 410; *Woodward v. Woodward*, 148 Mo. 241; *Manning v. Manning*, 79 N. C. 293; *Lane v. Lane*, 76 Me. 527; *Simmons v. Thomas*, 43 Miss. 31. (2) The plaintiff is entitled to an accounting in equity from the defendant without regard to their marital relationship. *Schulz v. Ziegler*, 83 Atl. 968; *Aubry v. Schneider*, 69 N. J. Eq. 633; *Maekotter v. Maekotter*, 131 N. Y. Supp. 815; *Bates v. Hamilton*, 144 Mo. 14; *Leach v. Beattie*, 33 Vt. 195; *Henson v. Moore*, 105 Ill. 403; *Clayton v. McKay*, 143 Pa. St. 225; *Trapnall v. Hill*, 31 Ark. 345; *Neil v. Morris*, 73 Ga. 406; *Fire Proofing Co. v. St. Louis, etc., Co.*, 177 Mo. 559; *Beck v. Kallmeyer*, 42 Mo. App. 571. (3) A proper case was presented for the appointment of a receiver, and consequently for the interposition of a court of equity, and this is true irrespective of the conflicting claims of the parties to the rents. *Sanford v. Ballard*, 33 Beav. 401; *Goldberg v. Richards*, 26 N. Y. Supp. 336; *Ames v. Ames*, 148 Ill. 340; *Weise v. Welsh*, 30 N. J. Eq. 434; 34 Cyc. 64; *High on Receivers* (4 Ed.), sec. 604, p. 756; *Woodward v. Woodward*, 148 Mo. 241; *Manning v. Manning*, 79 N. C. 293; *Lane v. Lane*, 76 Mo. 527; *Revised Stat-*

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utes 1909, sec. 2018; Stark v. Grimes, 88 Mo. App. 413; Bird v. Lamphear, 36 N. Y. Supp. 1069; Drury v. Roberts, 2 Md. Ch. 159; March v. Smith, etc., Co., 47 N. J. Eq. 193; Trust Co. v. Mintzer, 65 Minn. 132; Darusmont v. Patton, 72 Tenn. 597; Schwabacher v. Kane, 13 Mo. App. 131; Eddy v. Baldwin, 32 Mo. 369; Mitchell v. Bradstreet Co., 116 Mo. 240; Pelham v. Grocery Co., 156 Ala. 509; Federal Bankrupt Law, sec. 1, subd. 15; In re Schoesmith, 135 Fed. 684. (4) The respondent is entitled to the whole of the rents derived from the property in question during the joint lives of himself and his wife. Hall v. Stephens, 65 Mo. 670; Bank v. Fry, 168 Mo. 508; Frost v. Frost, 200 Mo. 474; Craig v. Bradley, 153 Mo. App. 591; Dickey v. Converse, 117 Mich. 453; Bynum v. Wicker, 141 N. C. 96; Revised Statutes 1909, sec. 2878.

FARIS, J.—This is an appeal from an order of the circuit court of the city of St. Louis refusing to revoke and vacate an order for the appointment of a receiver. The only questions in issue are therefore whether the facts set out in the petition of plaintiff were such as to legally justify the action of the court in appointing a receiver. The facts of the case and the law to be applied to them necessarily involve the goodness, in a way, of the second amended petition of plaintiff.

This petition was unnecessarily voluminous, covering, as it does, some fourteen pages of the printed record. We do not think it necessary to cumber the books with the body of it, and to this end have adopted as a fair analysis the statement of its contents as they are set forth in respondent's statement of the facts, with some emendations of our own. This petition shows in fair substance the following facts set out therein:

The plaintiff and defendant are husband and wife. In December, 1904, the plaintiff purchased a lot of

land in the city of St. Louis, and caused the same to be conveyed to himself and the defendant, so that an estate by the entirety was created. Immediately after this purchase, namely, in 1905, the plaintiff and defendant caused to be erected on this lot an apartment building. The cost of the lot was \$4125, and it was paid wholly by the plaintiff; but, in order to pay for the cost of the apartment building, which amounted to \$17,500, the plaintiff and the defendant borrowed that amount from one Newberry, and executed their joint notes therefor and for the interest thereon, and executed a deed of trust on the property securing the payment of said notes. The plaintiff paid \$3500 on the principal of this indebtedness, and paid the joint semi-annual interest notes five years, the same consisting of ten semi-annual interest notes, aggregating \$3915.

In 1909, when the balance of the principal of this indebtedness, namely, \$14,000, matured, the plaintiff and defendant borrowed that amount from one Spratte on a new deed of trust on the property, giving therefor their three joint principal notes and their six joint semi-annual interest notes. The plaintiff paid \$1500 on the three principal notes and paid all of the six joint interest notes, the latter amounting to \$2227.60.

This left an unpaid indebtedness of \$12,500, which was borrowed by the plaintiff and defendant from one Clara E. Hatifield, in April, 1912. For this new loan the plaintiff and defendant gave their joint principal note for \$12,500, payable three years after date, and their joint six semi-annual interest notes for \$312.50 each. The defendant paid one of these interest notes.

In addition to the payments already mentioned the plaintiff paid all general and special taxes assessed against the property for the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911, and also the costs of the fire and tornado insurance for those years, all of which payments were required to be made by the aforesaid deeds of trust.

The apartment building hereinbefore referred to contains four apartments, one of which was occupied by the plaintiff and defendant, and the other three of which were rented to tenants, two producing fifty dollars each per month and one producing seventy dollars per month. The defendant collected all the rents accruing from these apartments prior to May 1, 1912. Immediately prior to that date, the plaintiff notified the several tenants that he objected to any further payments of rent to the defendant. Notwithstanding this notification the defendant continued to collect the rents from the tenants to the time of the filing of the amended petition in May, 1913.

In December, 1912, one of the apartments was vacated and the plaintiff employed a real estate agent to rent it. The defendant, however, refused to permit the agent to rent the apartment and prevented him from doing so, and also "prevented the plaintiff from exercising any control or dominion whatsoever over said apartment, and arrogated to herself, assumed and exercised, to the entire exclusion of the plaintiff, all dominion and control over said apartment," and furthermore re-rented the apartment for \$50 and has continued collecting the rent therefrom.

The plaintiff also requested the defendant to vacate the apartment occupied by them, but this she has refused to do.

The defendant has never paid to the plaintiff, or accounted to him for, any of the rents collected by her, as aforesaid, but on the contrary has refused so to do. At the time of the filing of the amended petition, with which we are here alone concerned, there was overdue and unpaid one of the interest notes given by the plaintiff and defendant to said Clara E. Hatfield, and secured by the last mentioned deed of trust, and the trustee under the power therein was proceeding to sell the property hereinbefore mentioned under the provisions of the deed of trust.

"The defendant," the petition further avers, "has secreted all of her property, other than her interest in the aforesaid parcel of land, so that the same cannot be reached by process of law." The defendant in November, 1912, instituted an action for divorce against the plaintiff and that action was at the time of the filing of the amended petition still pending and undetermined.

For relief plaintiff in his petition prayed the court for an accounting of the amounts paid by plaintiff; of the rents collected by defendant and of the amount for which she was alleged to be indebted to the plaintiff on account of her collection of rents and for judgment therefor, and that defendant be restrained from interfering with the plaintiff's rights of dominion, control and possession of the said premises and that a receiver, pending the action, be appointed by the court to take charge of the property and rent the same and collect the rents therefrom, and for all further proper relief.

To this petition, on May 23, 1913, defendant filed a demurrer, in substance for that the petition did not state facts sufficient to constitute a cause of action against defendant, nor any facts entitling plaintiff to the relief prayed for or any relief, and that the same stated no equities in favor of plaintiff. This demurrer was overruled by the court on June 16, 1913. Prior, however, to the overruling of this demurrer and on June 4th preceding, the court, upon motion of plaintiff, appointed one Joseph M. Levi receiver in accordance with the prayer of plaintiff's petition. Two days thereafter and on the 6th of June, 1913, defendant filed her motion to revoke the order theretofore made by it appointing said Levi receiver, and for reasons for said motion to revoke averred in substance that said Levi was not an impartial person between plaintiff and defendant; that he was an intimate business and social acquaintance of plaintiff; a witness for him

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in other litigations and that he was hostile to and prejudiced against defendant, and further for that the petition did not state facts constituting a cause of action or any sufficient facts permitting the court to appoint a receiver. This motion being overruled, defendant thereupon took and perfected this appeal.

The only question involved herein goes to the correctness of the court's action in appointing a receiver.

While the appeal involves incidentally the goodness on demurrer of the plaintiff's petition, demurrability is but adventitious, since no appeal lies in the middle of a case from the holding good of a petition on demurrer without final judgment. Of course if the petition states no cause of action there is no basis for the court's action in appointing a receiver, and appellant's motion to vacate the order should have been sustained.

So far as the question raised by appellant below of the fitness of Levi to act as receiver is concerned, we note that this was heard by the trial court on affidavits and ruled adversely to appellant's contention. His finding was right on this point. Nor need we consider whether affidavits were the proper method of offering proof, since both sides resorted to it, nor do they here question it. So there was either proof enough of the right action of the court below or there was no competent proof whatever of any bias or partiality.

The power of a court of general jurisdiction, as is a circuit court, to appoint receivers, is vested by our statute (Section 2018, R. S. 1909), in the sound discretion of such courts. For the statute says:

"The court, or any judge thereof in vacation, shall have power to appoint a receiver, whenever such appointment shall be deemed necessary, whose duty it shall be . . . to keep and preserve all property and protect any business or a business interest intrusted to him pending any legal or equitable proceeding concerning the same."

If the statutory words "whenever such appointment shall be deemed necessary" do not vest in a circuit judge a discretion (*Stark v. Grimes*, 88 Mo. App. 409; *Cantwell v. Lead Co.*, 199 Mo. 1) in such behalf so broad as only to be a matter of review by us in case of palpable abuse, we fail to read it correctly. The statute so reading, we need not concern us to determine whether the power to appoint a receiver be not also given to a court of general chancery jurisdiction by reason of the *lex non scripta* of the equity procedure.

The plaintiff and the defendant, though spouses when this action was begun, had the right, not to say the privilege, of suing and maintaining suits in equity against each other. [*Woodward v.*

Husband and  
Wife: Suit by  
One Against  
Other.

*Woodward*, 148 Mo. 241; *Porter v. Bank*, 19 Vt. 410; *Lane v. Lane*, 76 Me. l. c. 527; *Simmons v. Thomas*, 43 Miss. 31.] At common law a married woman

could not alone sue any one unless her husband were civilly dead, or an alien always residing abroad; *a fortiori*, she could not sue her husband. In equity, however, from early times at least, she could sue her husband, though such action, till enabling statutes were passed, was maintained by her only through a next friend. [10 Ency. Pl. & Pr. 195; *Simmons v. Thomas*, *supra*.] Our statute (Sec. 8304, R. S. 1909) long since changed the old rule so that she may now sue and be sued just as if she were *une femme sole*. So it follows that if in equity as to her separate estate when her husband's claims thereto were adverse and inimical to her own, she could always sue him by a next friend, and if the statute *supra* has emancipated her from the legal thralldom of a next friend, she may now sue her husband. Conversely, it follows her husband may now sue her, since as we have seen the disabilities forbidding such suits were practically all at common law, and in equity (the unity theory of the common law ex-

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cepted) such as affected the wife only. The duality of the spouses so far as affected their reciprocal rights to sue each other in equity, was long ago settled. [See cases and authorities, *supra*.]

Since the husband may sue his wife either in law or in equity; since the matter of the appointment of a receiver rests in the sound discretion of the circuit court, and since there is no doubt that the condition of the property here in jeopardy presents a strong case for the custody of some person not a partisan of either side, we think the petition was sufficient; that the order of the court was proper and ought to be upheld.

We do not pass on the question of whether the plaintiff and the defendant are entitled to the joint custody and control of the property, or whether the husband alone is entitled to such control and to the rents and profits of the property in the lifetime of the spouses and while the marriage relation still subsists. That question is not now in the case and not now raised by the appellant upon this appeal. These are certainly not matters about which appellant may with right complain; for upon some of the views she would be left with no present rights, except mayhap, and on this we do not now pass however, such as may be bottomed on the fact that she paid one small note on the indebtedness hanging over this property.

This is a most flagrant example of a useless and dilatory appeal, calculated besides to work—as it may have worked—great loss to both parties. Let the judgment of the circuit court be affirmed.

*Walker, P. J., and Brown, J., concur.*



FRANK W. RUTLEDGE v. E. W. SWINNEY et al.,  
Receivers of SEDALIA LIGHT & TRACTION  
COMPANY.

Division Two, July 14, 1914.

1. **NEGLIGENCE: Pleading: Defective Cross-Arm: Designed to Support Lineman.** Although the petition does not categorically aver that the cross-arm upon which plaintiff was resting a part of his weight while attempting to remove a transformer from an electric light pole and to replace it with a larger one, was intended to support his weight while he was performing that work, yet if it alleges that fact with sufficient clearness to notify the defendant company that the rotten condition of the cross-arm was the cause of his falling, defendant, having neglected to demur or to move to make the petition more definite, will not be heard to complain, after verdict, that the petition was insufficient in that respect.
2. **———: Defective Cross-Arm: Inspection: Facts of Case.** Plaintiff was directed to assist defendant's foreman and two other employees in removing from the cross-arm of an electric light pole a transformer and replacing it with a larger one. Some of the poles had become rotten at the ground, and many of the cross-arms used to support wires and transformers were defective and had to be replaced with new ones. After the old transformer was lowered to the ground and a new one raised and hung upon the cross-arm, plaintiff, whose duty it was to connect and solder several wires and in doing which it was necessary for him to go both above and below the transformer, on account of the position of numerous wires was compelled to unfasten his belt from the pole and climb over the transformer, and in doing so was unable to secure a hold upon the pole with his hands, but was compelled to sustain himself by taking hold of the cross-arm from which the transformer was hanging. The cross-arm appeared sound, but a short distance from the pole it was sound only at the exterior, the interior being rotten, so that when plaintiff placed a part of his weight upon it it broke, and its decayed condition was the immediate cause of his fall. Plaintiff's testimony is to the effect that it was not his duty to inspect poles or cross-arms; that the foreman had recently been going over the system and inspecting them, and required plaintiff and other employees to replace with new ones those found to be decayed; that a new cross-arm had recently been placed above the one that broke; that the work was a "rush job"

and plaintiff was not furnished with tools for inspecting cross-arms, which could be properly done only with a hand ax or hammer and chisel; and that he looked and saw that the cross-arm which broke appeared to be sound. It was apparently necessary for him to remove his belt from the pole, and he is not charged with negligence in that respect. *Held*, that a reasonable degree of care would have led the foreman to have carefully inspected the cross-arm, or to have furnished plaintiff with suitable tools and instructed him to inspect it before installing the transformer, and the case was one for the jury.

3. ———: ———: **Disregarding Evidence.** Unless the testimony on which the verdict rests is so utterly at variance with the admitted or known physical facts as to require it to be cast aside, it will not be disbelieved by the appellate court.
4. ———: ———: **Opportunity of Inspection.** Where there was evidence that the work of replacing the transformer with a new one, on the decayed cross-arm, was a "rush job" and that the lineman was not furnished with tools for inspecting the cross-arm, it was not error for the instruction to include, as an element of his right to recover for injuries caused by the breaking of the cross-arm, that he "did not have the opportunity, time and means to discover the condition of the cross-arm."
5. ———: **Instruction for Defendant: No Evidence.** It is not error to refuse an instruction for defendant if there is no sufficient evidence upon which to base it. If the evidence does not tend to establish a custom among the defendant's linemen of inspecting cross-arms before they went upon them, it is not error to refuse an instruction basing a defense upon such custom.
6. ———: ———: **Refused Covered by Those Given.** It is harmless error to refuse an instruction for defendant whose theory of defense is covered by others given. Even though it be conceded there was slight evidence to support an instruction telling the jury that if it was the duty, under the system of employment adopted by defendant, for each lineman to inspect cross-arms before going upon them, any error in refusing that instruction was cured by another given telling the jury that even though linemen frequently placed their weight upon cross-arms, it was plaintiff's duty, before placing his weight upon the cross-arm in question, to exercise ordinary care to ascertain whether it was adequate to bear his weight, and if he failed to exercise such care he could not recover.

7. **EXCESSIVE VERDICT: \$9000.** Plaintiff, a strong man twenty-nine years old, with large experience in handling and repairing electrical appliances and in doing signal work on railroads, earning at the time of his injury \$65 per month and prior thereto as much as \$85, while engaged in substituting on a cross-arm of an electric light plant a transformer with a larger one, fell to the ground, breaking a bone at the elbow, which has never been removed, and so tearing loose the muscles from the bone as to render that arm useless. One of his ears was so injured internally that he has lost the power to hear through it; the muscles of one side of the body are withered and atrophied, which has given him a lop-sided appearance; his general health has declined, and his weight been reduced from 152 to 121 pounds; the pains produced by the injuries were so great that within a few hours his reason was temporarily dethroned, and the pains continued for two weeks; and whether or not the loose bone in the arm can be so treated or operated upon that he can again use the arm, is left in doubt by the testimony of the physicians. *Held*, that a verdict for \$9000 is not excessive.

Appeal from Pettis Circuit Court.—*Hon. Hopkins B. Shain*, Judge.

**AFFIRMED.**

*George F. Longan and Seddon & Holland* for appellants.

(1) The court should have given the peremptory instruction asked by appellants at the close of all the evidence, because the petition does not state a cause of action, in that it does not allege that the cross-arms and pins referred to in respondent's petition were furnished for the purpose of bearing the weight of linemen, or that respondent, while using same, was acting in the discharge of his duties. *Roberts v. Tel. Co.*, 166 Mo. 369; *Telephone Co. v. Speicher*, 117 Mo. 405; *Sindlinger v. Kansas City*, 126 Mo. 355; *Kelly v. Lawrence*, 195 Mo. 75; *Flood v. Tel. Co.*, 131 N. Y. 603. Because there was no testimony that the cross-arms and pins in question were furnished for the purpose of bearing the weight of linemen. Because it was the duty of respondent to make his own inspection. The

evidence in this case shows that had he made a proper inspection, he would have discovered that the cross-arm and pins in question were weak on account of internal decay and would not sustain his weight. *Smith v. Light & Power Co.*, 143 Mo. 572; *Forbes v. Dunnavant*, 198 Mo. 193; *McIsaacs v. Lighting Co.*, 172 Mo. 89. (2) The court erred in giving instruction number 11 at the instance of respondent, for the following reasons: (a) Because it provides for a recovery if the jury believe that the cross-arms on the pole in question and the pins thereon were in a defective and unsafe condition, without requiring any finding that they were designed or furnished to sustain the weight of linemen, or any finding that the respondent, in placing his weight on same, was acting in the discharge of the duties of his employment. *Coyne v. Railroad*, 133 U. S. 370. (b) Because it overlooks the direct testimony offered by appellants to the effect that it was the duty of each lineman to act as his own inspector. (c) Because, if respondent did not have the means at hand to make an inspection, he should have acquired them. (d) Because, in part, it is predicated on matters in regard to which there was no testimony, to-wit, that part in which a finding is required that plaintiff did not have opportunity, time or means to discover the condition of the cross-arm in question. (3) The court erred in refusing to give instruction 3 at the instance of appellants. Said instruction is amply supported by the evidence, correctly states the law and should have been given. (4) The court erred in refusing to give instruction number 5 at the instance of appellants. Said instruction correctly states the law and should have been given.

*Montgomery & Montgomery and Charles E. Yeater*  
for respondent.

(1) It was not necessary for a recovery by plaintiff to either plead or prove that the cross-arms and

pins were furnished for the purpose of bearing the weight of linemen. The petition alleges that the cross-arm was a part of the place where the plaintiff had to work and that in order to complete his work he had to put his hand thereon in changing his position and that by reason of its defective condition, due to internal rot, which defendant could have ascertained by proper inspection, but which was not obvious, or apparent to the senses, plaintiff fell and was precipitated to the brick sidewalk below, while engaged on a rush job with neither time nor tools to inspect with. The evidence is undisputed that it was impossible for plaintiff to ascend the pole without using the cross-arms and that putting his hand on the cross-arm while undoing his safety belt and starting to climb the pole was an act absolutely necessary in order to make the ascent; and the evidence is also undisputed that all linemen customarily every day use the cross-arms in their work and in climbing; and defendants proved that linemen put their weight on the pins, and that the foreman, after plaintiff's fall, put the entire weight of his body on the very cross-arm in question in finishing the work. It is also undisputed that this cross-arm was not used for carrying wires, but for the purpose of supporting the iron transformer. The courts have held as a matter of law that cross-arms must be and always have been used by linemen as a means of support and that it is the duty of the master, aside from exceptional cases, to inspect them, so that they may be sufficient to meet the requirements of such use. *Rutledge v. Swinney*, 170 Mo. App. 251; *McDonald v. Tel. Co.*, 22 R. I. 131; *Clairain v. Tel. Co.*, 40 La. Ann. 178; *Telegraph Co. v. Cloman*, 97 Mo. 620. (2) The fact that plaintiff grabbed the pins in the act of falling is entirely immaterial as that had nothing to do with the defective condition of the cross-arms which had previously shelled off under the grasp of his left hand. Clutching in desperation the pins, like a drowning man

grasping at straws, was merely the act of a person falling and in imminent danger of great bodily injury acting on the natural impulses of the instinct of self-preservation, and cannot be condemned. Plaintiff, however, could legally use the pins for a support by his hands in climbing. *Rutledge v. Swinney*, 170 Mo. App. 251; *Chisholm v. Tel. & Tel. Co.*, 185 Mass. 83. (3) Conceding that cross-arms on a pole, and the pole itself are primarily intended only for carrying wires, they are suitable for the use of the linemen in steadying themselves in climbing and working on the poles and the undisputed evidence, including that of defendants, shows that they are so used, and it is self-evident that the master knows that they must be so used, and therefore, the contention of appellants in their brief, that plaintiff must be held negligent in law from the mere fact that he attempted to use the cross-arm in making his ascent, is unsound and erroneous, and defendants' given instruction 9 was more favorable than they were entitled to. *Rutledge v. Swinney*, 170 Mo. App. 251; *Brimer v. Railroad*, 109 Mo. App. 493; *Palmer v. Kinloch Tel. Co.*, 91 Mo. App. 115; *Winscott v. Railroad*, 151 Mo. App. 378; *Chisholm v. Telephone Co.*, 185 Mass. 83. (4) It was not the duty of the plaintiff to make a comprehensive inspection on his own motion, of the pole or its attachments for hidden or latent defects, and under the law of master and servant he was bound only to make such a casual inspection of obvious defects as were apparent upon the surface, and this duty the defendants could not impose upon the plaintiff by virtue of any rule, custom or understanding, or by refusing to assume the duty; and since the trial court instructed the jury by instruction B, given on the motion of the court, that unless the defendants had assumed the duty of inspection for hidden or latent defects, it was the duty of plaintiff to make his own inspection, in order that he might ascertain any and all defects that might make the cross-

arms unsafe to him, whether said defects were obvious or hidden, it is therefore apparent that such instruction was unduly favorable to defendants and put an unfair burden upon the plaintiff. *Corby v. Tel. Co.*, 231 Mo. 436; *Knorpp v. Wagner*, 195 Mo. 662; *Nicholds v. Plate Glass Co.*, 126 Mo. 64; *Hysell v. Swift & Co.*, 78 Mo. App. 43; *Porter v. Railroad*, 71 Mo. 78; *EPPERSON v. Tel. Co.*, 155 Mo. 384; *Lee v. Railroad*, 112 Mo. App. 402; *Doyle v. Trust Co.*, 140 Mo. 18; *Rigsby v. Supply Co.*, 115 Mo. App. 308; *Benton v. Railroad*, 32 Mo. App. 458; *Covey v. Railroad*, 86 Mo. 641; *Corey v. Railroad*, 27 Mo. App. 179; *Flynn v. Bridge Co.*, 42 Mo. 531; 26 Cyc. 1213.

BROWN, J.—Plaintiff sues for injuries sustained while working for defendants as a lineman. Defendants are receivers of the Sedalia Light & Traction Company.

This is the second appeal in this case. On the first trial plaintiff obtained a judgment of \$5000, which was reversed by the Kansas City Court of Appeals on account of erroneous instructions. [170 Mo. App. l. c. 265.] Upon a second trial plaintiff had judgment for \$9000, from which defendants appeal to this court.

The plaintiff sustained his alleged injuries by falling twenty-one feet from an electric light pole upon a brick sidewalk. The nature of his injuries will be noted in connection with our conclusions.

The plaintiff, on the afternoon of February 8, 1912, was directed to assist defendants' foreman Gus Bergfelder and two other employees in removing a Horneberger transformer from a pole and replacing same with a larger transformer known as a General Electric.

The lighting plant for which defendants were receivers had been constructed several years. Some of their poles had become rotten at the ground, and many of the cross-arms on their poles used to support wires

and transformers were also defective and had to be replaced with new cross-arms. Defendants had ordered all of their "Horneberger" transformers replaced with "General Electrics." The latter is described as being a larger transformer than the Horneberger. The sizes and weights of these transformers are not stated in the evidence or pleadings, and, while some originals and models were introduced, and the trial court and jury may have obtained a correct knowledge of their respective sizes, it is somewhat difficult for us to do so from the printed record.

The immediate cause of plaintiff's fall was the decayed condition of part of a cross-arm upon which he was installing a new transformer. He testifies that after the old transformer had been lowered to the ground and the new transformer raised and hung upon the cross-arm, it was his duty to connect, paint and solder several wires; in which work it was necessary for him to go both below and above the transformer. That, on account of the position of numerous wires, he was compelled to unfasten his belt from the pole and climb over the transformer; in doing so he could not secure a hold upon the pole with his hands, but was compelled to sustain himself by taking hold of the cross-arm to which the transformer was hanging. There is no dispute about the fact that the cross-arm appeared sound, and may have been sound where it was fastened to the pole, but a short distance from the pole it was only sound about a fourth of an inch deep, and the interior was so rotten that it crumbled or sloughed off under plaintiff's weight, or such of his weight as he placed upon it with his hand.

Plaintiff testified that he was performing a "rush job," commenced about three p. m. That he was instructed by the foreman to complete the job so as not to interrupt the service to some nine customers who obtained lights through this particular transformer. According to plaintiff's evidence it required about



three hours to take down an old transformer and replace it with a new one, many wires having to be connected, soldered and painted and other appliances changed. That after arriving at the pole they had less than two hours to complete the job, the lights being needed about 4:30 on that short February day. Plaintiff further testified that this pole stood in a leaning position, but that it was not his duty to inspect poles or cross-arms, and that Mr. Bergfelder, defendants' foreman, had recently been going over defendants' lighting system inspecting the cross-arms with a hammer and chisel; that by this method he detected many cross-arms which were decayed, and caused plaintiff and other employees to replace such defective cross-arms with new ones. That he was told not to inspect, and was not furnished with tools suitable for that purpose. That the only proper tools for inspecting cross-arms were a hand axe or hammer and chisel; that, while the foreman kept a hammer and chisels locked in a box at defendants' office with which he inspected cross-arms, in directing what tools and appliances should be taken to the place where plaintiff was injured, said foreman omitted the hammer and chisel.

Plaintiff further testified that in the morning of the day he was injured he assisted defendants' foreman in taking down a Horneberger transformer and hanging a larger one in its place in another part of the city; that before making that change defendants' foreman climbed the pole and inspected with hammer and chisel the cross-arm upon which the new transformer was to be hung. Plaintiff also testified that because he had been told not to inspect, because no tools suitable for that purpose were furnished or taken to the place of the accident, and because the pole where he undertook to hang the transformer contained a new cross-arm near the top thereof, he supposed defendants' foreman had recently inspected that pole and the cross-arms thereon, and, consequently, did not un-

dertake any inspection except with his eyes. That he looked and saw that the cross-arm upon which the new transformer was to be hung appeared to be sound. There were four cross-arms on the pole; the transformer was hung on the second one from the bottom.

Plaintiff further testified that when he suggested how a certain kind of work should be done to secure the safety of employees, defendants' foreman said: "When you fellows are authorized to inspect or authorized to direct work, then we will do the way you want it done . . .; until then you will do what you are told to do."

George Green, a witness for plaintiff, stated that he worked for defendants under Mr. Bergfelder, the foreman, for several months, quitting the job December 23, 1911, prior to plaintiff's injury on February 8, 1912. Mr. Green stated that foreman Bergfelder went about over defendants' electric light system almost every day inspecting cross-arms with hammer and chisel, and inspecting poles at the ground with a steel bar; that he ordered poles and cross-arms removed whenever he found by such inspections they were defective or rotten. That when suggestions were made by the linemen about how they thought work ought to be done, the foreman would inform them that they must "do what they were told to do." Witness stated that it was customary for the foreman to inspect poles and cross-arms before sending linemen to repair them. The defendants' attorneys did not cross-examine this witness.

C. G. Green also testified for plaintiff that he frequently saw defendants' foreman Bergfelder going over town inspecting poles, wires and cross-arms, and making notes in a small book.

David F. Webster, defendants' superintendent, testified that he never gave any orders to his linemen about inspecting, but it was the custom for each lineman to do his own inspecting of cross-arms, which

could readily be done with a pair of plyers, connectors and a screw-driver, which tools every lineman was required to furnish and carry with him. Witness said that he had never climbed any poles, and seldom knew when cross-arms were defective, except when the linemen reported them to him; and never instructed any of the employees to climb poles to inspect cross-arms, and only supposed cross-arms were repaired when they became so badly out of order that the defects could be seen from the ground. Witness gave it as his opinion that the new cross-arm near the top of the pole where plaintiff received his injuries was placed there about two weeks before the injury occurred. Mr. Webster also stated that he appointed Mr. Bergfelder foreman of defendants' lighting plant, but could not remember if this was before or after plaintiff was injured.

Gus Bergfelder, testifying for defendants, stated that he was not foreman for defendants at the time plaintiff was injured; was simply a lineman, the same as plaintiff, but, being the oldest in the employ of defendants, the orders were given to him by superintendent Webster, and he (Bergfelder) looked after seeing that the work was performed. Mr. Bergfelder further testified that he had never climbed any poles for the purpose of inspecting cross-arms with hammer and chisel. That it was the custom for each lineman to inspect cross-arms as he needed to use them, which could readily be done by tapping them with plyers, connectors or a screw-driver, which tools each lineman carried. Witness further stated that the new cross-arm near the top of the pole where plaintiff was injured was placed there in September, 1911. That after plaintiff's injury witness climbed the pole and, within a few minutes, completed the installation of the new transformer, standing on the transformer while he did that work. That he thought an hour was sufficient

time to take down a Horneberger and install a new transformer.

There is not much conflict in the evidence as to what tools a lineman was required to supply and carry with him—a pair of plyers, connectors and a screw-driver, or a knife with a stub or broken blade, the knife being used in stripping wires and unscrewing fixtures on transformers.

Lucian Brewington, who had worked for defendants, and who was introduced by them as a witness, testified that he knew of no custom of inspection on defendants' plant. Said witness further testified that striking a cross-arm with a pair of plyers or connectors would not ordinarily afford much information as to whether it was sound. He usually inspected cross-arms either by shaking them or by driving his screw-driver into them with a hammer, if he had the hammer. When a cross-arm looked sound he ordinarily went ahead and used it without inspection.

Frank Leach, an electrician and lineman of large experience, stated that cross-arms could not be satisfactorily inspected with plyers or connectors. If a cross-arm was dry and hollow that fact might be detected by tapping it with plyers, but if the inside of the cross-arms was simply rotten and full of moisture, and wires were strung upon it, its unsoundness could not be detected by tapping it with a light instrument. In such cases the proper inspection could only be made with a hand axe or with a hammer and chisel.

Such additional facts as may be necessary to a full understanding of the case will be given with our conclusions.

### OPINION.

I. The first point relied upon by defendants for reversal is that the plaintiff's petition is insufficient, in that it does not charge that the cross-arm which crumbled or sloughed off under

Petition.

plaintiff's hand causing his fall and consequent injuries was designed or intended to support the weight of a lineman. The petition contains the following averments.

"And plaintiff avers that it was the duty of the defendants, through their officers, agents, and foremen, to exercise ordinary care in inspecting their poles, cross-arms, pins and wires, and other places where their workmen would have occasion to work, so as to ascertain whether such places were ordinarily safe for said workmen thereat engaged in their said work, but that the defendants wholly failed to discharge such duty of inspection so incumbent upon them with reference to the said pole situate as aforesaid at the intersection of said Vermont avenue and Second street in the city of Sedalia.

"And plaintiff says that the cross-arms upon said pole and the pins sunk therein were defective, unsafe and dangerous, and that the defendants, knew, or, in the exercise of ordinary care and diligence, should have known of such defective, unsafe and dangerous condition, and should have remedied the same by the necessary repairs so as to make the same safe for workmen engaged in the work of defendants thereon; and plaintiff also says that the plaintiff had no knowledge whatever of the defective, unsafe and dangerous condition of said pole, cross-arms and pins."

While this petition does not categorically aver that the cross-arm in question was intended to support plaintiff's weight while he was hanging the transformer, it alleges that fact with sufficient clearness to notify defendants that the rotten condition of the cross-arm was the cause of plaintiff's injury. It recites that it was the duty of defendants to inspect their cross-arms and make the same safe for employees to work thereon. This recital is equivalent to averring that it was necessary and intended that linemen should go upon the cross-arms in performing their work. The

defendants having neglected to either demur or move to make the petition more definite cannot, under the facts in this case, be heard to complain after verdict. [Sexton v. Metropolitan Street Ry., 245 Mo. 254, l. c. 262-263; Parker v. United Railways, 154 Mo. App. 126.]

The answer of defendants is a general denial and a general plea of contributory negligence.

There is a recital in the petition that the pins in the cross-arms were defective, but that part of the petition should be treated as surplusage. The evidence shows that plaintiff did not touch the pins until the cross-arm itself crumbled and gave way. He then caught hold of two of the pins in the cross-arm to avoid falling, but those pins broke or pulled out. It was the decayed condition of the cross-arm, not the pins, which caused plaintiff to fall.

The case of Roberts v. Missouri & Kansas Telephone Co., 166 Mo. 370, is not "on all-fours" with the case at bar, as defendants assert. In the Roberts case the plaintiff was not relying upon someone else to inspect. He seems to have had the time, tools and opportunity to inspect, but neglected to do so. It further appears that Roberts had actual knowledge that the cross-arm upon which he stepped was defective, because he saw that one of the pins was decayed and had broken. Yet, notwithstanding that knowledge, without fastening his belt to the pole, he stepped out on the cross-arm two feet from the pole. In the case at bar there was nothing in the outside appearance of either the cross-arm or pins to indicate decay or hidden defects. It is true that Roberts, like the plaintiff here, released his belt from the pole, but plaintiff states that he had to do so in order to shift his position and climb over the transformer and numerous wires. The defendants do not assert that plaintiff was guilty of any negligence in removing his belt from the pole. It was apparently necessary to do so. The case of Corby

v. Mo. & Kan. Tel. Co., 231 Mo. 417, while not "on all-fours" with this case, furnishes strong support for respondent's contention.

The size of the particular cross-arm which crumbled under plaintiff's hand is not given, except through a model which is not before us, but it does appear that said cross-arm was strong enough at the pole to hold up the old transformer and also the new one, and if it appeared to be sound it was perfectly natural for plaintiff to suppose that it would sustain his weight a few inches from the pole where he took hold of it.

The putting up of a larger transformer caused greater pressure upon the cross-arm than it had theretofore borne, and only a reasonable degree of prudence on the part of Mr. Bergfelder, the foreman, would have caused him to inspect the cross-arm carefully, or to have furnished plaintiff with suitable tools and instructed him to inspect it before installing the larger transformer.

Cases may arise where a lineman would be guilty of contributory negligence in placing his weight upon a cross-arm without first fastening his belt to the pole, but this is not one of them.

II. Counsel for defendants make a strenuous effort to convince us that the jury should have believed their witnesses and disbelieved those who testified for plaintiff, including the plaintiff himself.

**Evidence.**

There are cases where the testimony of witnesses is so utterly at variance with the admitted or known physical facts as to justify casting such evidence aside (*Stafford v. Adams*, 113 Mo. App. 717); but this is not a case of that kind. James Green, who corroborates plaintiff most fully as to defendants' custom in regard to inspections, and consequently contradicted the evidence of defendants' witnesses Bergfelder and Webster, made a very straightforward statement, and was not even cross-examined by de-

defendants' attorneys. So far as the evidence is concerned, we will say that defendants' demurrer thereto was wholly frivolous, and if there was no point in the case except the alleged insufficiency of the evidence we would feel it our duty to affirm the judgment with ten per cent damages, as provided by section 2084, Revised Statutes 1909.

III. We will next consider the issues arising on the giving and refusal of instructions.

**Plaintiff's  
Instructions.**

A most earnest complaint is made against plaintiff's instruction number 2, which reads as follows:

"The court instructs the jury that if they believe from the evidence that on the 8th day of February, 1912, the plaintiff, Frank W. Rutledge, was engaged in the line of his duty as a lineman for the defendants and in the performance of such duty was engaged in the work of replacing a small transformer with a larger transformer to meet increased service on defendants' pole at the northwest corner of Second and Vermont streets in the city of Sedalia, and was engaged in said work with other workmen under the supervision and control of defendants' foreman and subject to his orders and control, and if you believe from the evidence that the second bottom cross-arm on said pole and the pins on the north end thereof were in a defective and unsafe condition for linemen working thereon, and that at said time such condition of the same was known, or by the exercise of ordinary care could have been known by the defendants, and if you believe that from the nature and character of the work, the plaintiff did not have the opportunity, time or means to discover the condition of said cross-arm, then your verdict must be for the plaintiff, provided you further find and believe from the evidence that the plaintiff was in the exercise of ordinary care at that time and received damages as the result thereof."



Plaintiff testified that he was required to perform a rush job and not furnished tools with which he could have detected the decayed and unsafe condition of the cross-arm. Consequently there was substantial evidence that he did not have "the opportunity, time and means" to discover the condition of said cross-arm as recited in the instruction under consideration. The weight to be given plaintiff's evidence is an issue which was foreclosed by the verdict of the jury. [Dutcher v. Railroad, 241 Mo. 137, l. c. 168.] The giving of this instruction did not constitute error.

The ninth instruction given at the request of plaintiff is much like instruction number 2, and reads as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff was sent up the pole in question by defendants' foreman under circumstances that deprived him of the means and opportunity of inspecting the cross-arm for latent defects and if they believe that the foreman in ordering him to the top to do a rush job knew that plaintiff had neither the means or time for a comprehensive inspection, and that plaintiff's fall was due to a latent or hidden defect in the second cross-arm from the bottom, then the plaintiff had a right to presume from such orders and action of the foreman that the pole and its attachments had been recently inspected and found to be in good condition, and that the cross-arm was reasonably safe for the use the foreman must have anticipated he would make of it."

The two instructions above quoted furnish a fair outline of plaintiff's theory of the case.

IV. The court refused the following instruction requested by defendant:

"The court instructs the jury that if you believe and find from the evidence that on February 8, 1912,

**Refused  
Instructions.**

and for some time prior thereto plaintiff was in the employ of defendant as a line-man and that under the system of work adopted by defendant for linemen it was the duty of plaintiff, before he climbed a pole or rested his weight upon a cross-arm, to make a careful inspection to ascertain whether such pole or cross-arm was sufficient to sustain his weight before placing his weight thereon, then and in that case the plaintiff is not entitled to recover and you will find your verdict for the defendant.”

It is very doubtful if there was sufficient evidence upon which to base this instruction. The defendants' superintendent, Mr. Webtser, stated the he gave no orders to his linemen about inspecting. From Mr. Webster's evidence it seems that he thought it unnecessary to inspect or take down cross-arms until their unsafe condition became so obvious that it could be observed from the ground. He seems to have regarded inspections as a matter of little moment. Mr. Bergfelder, the foreman, testified that it was the custom among defendants' employees for each lineman to inspect cross-arms before going upon them, yet Mr. Bergfelder gave no instance of this custom being observed, and admitted that, without an inspection, he himself stood upon the transformer while it was hanging on the very cross-arm, a part of which had crumbled in plaintiff's hand, causing him to fall. Notwithstanding Mr. Bergfelder knew this cross-arm was badly decayed he seems to have depended upon it to hold up both himself and the transformer.

Lucian Brewington, another witness introduced by defendants, stated that when a cross-arm looked sound he ordinarily went upon it without further inspection. It is difficult to see how a system or custom of inspection could come into existence or be adopted which was not prescribed by any rule of defendants, and

seldom, if ever, practiced by any of its employees. From the evidence it is certain that the decayed condition of the cross-arm which caused plaintiff's fall could not have been discovered from the ground, and a strong preponderance of the evidence tends to prove that its defects could not have been ascertained without the aid of a hammer and chisel or hand axe.

V. Yet if it be conceded that instruction number 3 requested by defendants should have been given, we think its refusal was harmless, because  
**Instructions Sufficient.** defendants' theory of the case was properly presented to the jury by other instructions. Instruction number 7 given at the request of defendants, reads as follows:

"The court instructs the jury that even though you believe and find from the evidence that linemen frequently placed their weight on cross-arms, yet it was the duty of plaintiff, before placing his weight, or part thereof, on the cross-arm in question, to exercise ordinary care to ascertain whether it was adequate to bear such weight. And the court instructs the jury if you believe and find from the evidence that plaintiff failed to exercise such care, and that had he done so he would have discovered that the cross-arm in question was too weak to sustain his weight, or part of it, then and in that case the plaintiff is not entitled to recover and you will find your verdict for the defendant."

This instruction was supplemented by one given by the court of its own motion, which reads as follows:

"The court instructs the jury that if they find and believe from the evidence under all the instructions, that it was the duty of plaintiff, when working upon and about cross-arms upon poles, to make his own inspection, in order that he might ascertain any and all defects that might render the cross-arms unsafe to

him, whether said defects were obvious or hidden, then the court instructs the jury that the term 'ordinary care' as having application to this duty of inspection, means such care and caution, considering all the facts and circumstances in evidence, including the elements of means and time for making a comprehensive inspection, as an ordinarily prudent person, upon whom this duty of inspection devolved, would use under the same or similar circumstances.

"On the other hand, if the jury find and believe from the evidence that the duty of inspection for hidden or latent defects in the cross-arms upon poles upon which plaintiff worked, was not the duty of plaintiff, but that said duty was assumed by defendants, then the court instructs the jury that the term 'ordinary care,' as used in these instructions and as applied to plaintiff's duty of inspection, is meant, such care and caution, taking into consideration all the facts and circumstances in evidence, including the elements of means and time for making such inspection, as an ordinarily prudent person would use under the same or similar circumstances in ascertaining obvious defects."

After a careful review of the instructions given and refused, we find that the law was correctly presented to the jury, and that defendants have no just cause of complaint on that score. [Richardson v. Railroad, 223 Mo. 325; Cytron v. Transit Co., 205 Mo. 1. c. 718.]

VI. There is not much conflict in the evidence regarding the extent of plaintiff's injuries. Prior to his fall he was a strong man twenty-nine years of age, with large experience in handling and repairing electrical appliances, and doing signal work on railroads. He was earning \$65 per month, and had earned as high as \$85 per month. By his fall a bone was broken in one of his elbows, which bone has never been removed. The

Judgment not  
Excessive.

muscles in his arm were torn loose from the bone so as to render that arm useless. One of his ears was so injured internally that he lost the power to hear through same. The muscles of the left side of his body are withered and atrophied, giving him a lop-sided appearance. His general health has declined, and his weight reduced from 152 to 121 pounds. The pains which his injuries produced were so great that, within a few hours after his fall, his reason was temporarily dethroned. His pains continued for two weeks.

Two physicians testified for defendants that they believed the loose bone in plaintiff's elbow could be so treated by an operation that plaintiff could again use the arm, but they admitted that an operation upon a joint was more difficult than upon other parts of the body, and their evidence was not reassuring. Plaintiff's physician testified that nothing could be done for his arm, and that his days of pole-climbing were over. The loss of hearing in one of his ears renders him unfit for signal work on railroads. Upon this evidence we hold that the judgment is not excessive.

VII. The evidence of defendants' witness Bergfelder tends to prove that he was not foreman for defendants at the time plaintiff was injured.

**Foreman.**

Bergfelder says that he gave orders and superintended defendants' work, "but was not duly appointed foreman." Defendants seem to have abandoned their theory that plaintiff's injury was caused through the negligence of a fellow-servant.

After a most careful review of all the evidence and authorities cited by defendants' counsel, we are convinced that the judgment should be affirmed, and it is so ordered. All concur.

## THE STATE v. THOMAS WARD, Appellant.

Division Two, July 14, 1914.

1. **LARCENY: Instructions: "Feloniously."** Where in a prosecution for grand larceny the court instructed the jury to find the accused guilty if they believed from the evidence that he wrongfully took and carried away a pocketbook and money from the possession of M., with the intent to fraudulently convert it to his own use and permanently deprive the owner thereof without his consent, the same being the property of M., the failure to require a finding that accused's intent in taking and carrying away the things stolen was felonious did not render the instruction erroneous.
2. ———: ———: **"Without Claim of Right."** Where the State's evidence tended to show that the accused picked the pocket of the prosecuting witness like an expert, that he was described to the police by his victim and was taken within an hour and a half with part of the money on him, and where he made no defense at the trial, a failure to require a finding that the taking was without claim of right would not be error, since the facts show there was no such claim.
3. ———: **Evidence: Identity of Stolen Bank Notes.** Evidence as to the identity of national bank notes found on the accused with those stolen from the prosecuting witness *held* sufficient to take the question to the jury.
4. ———: **Instructions: All the Law of the Case: Motion for New Trial: Appeal: Circumstantial Evidence.** Although the trial court's attention was at no time specifically called to a failure to instruct on circumstantial evidence, and the motion for new trial merely alleged that the court did not instruct on all the law of the case, still the Supreme Court is bound to see that no injustice is done by such omission, and it is *held*, in a trial for grand larceny, where direct evidence identifies the accused as the person who pressed against the prosecuting witness when his pocketbook was taken, and identifies money found on the accused as part of that then stolen, that an instruction on circumstantial evidence was not required.

Appeal from St. Louis City Circuit Court.—*Hon.*  
*William M. Kinsey*, Judge.

**AFFIRMED.**

*Barclay, Fauntleroy, Cullen & Orthwein* for appellant.

(1) The first instruction of the court in this case was insufficient in that it did not require the jury to find the defendant feloniously took, stole, and carried away money and property nor did it require them to find that the defendant took the property with the felonious intent to convert the same to his own use. *State v. Richmond*, 228 Mo. 362; *State v. Weatherman*, 202 Mo. 9; *State v. Moore*, 101 Mo. 326; *State v. Campbell*, 108 Mo. 614; *State v. Lackland*, 136 Mo. 31; *State v. Rutherford*, 152 Mo. 131; *State v. Littrell*, 170 Mo. 15; *Barnes v. State*, 59 N. W. 125. (2) Where the evidence on a trial is wholly circumstantial, the jury should be instructed that they should not convict the accused, unless the State has proved his guilt from the evidence beyond a reasonable doubt, by facts and circumstances, all of which are consistent with each other and with his guilt, and absolutely inconsistent with any reasonable theory of innocence. *State v. Moxley*, 102 Mo. 375; *State v. Lackland*, 136 Mo. 33; *State v. Woolard*, 11 Mo. 256; *State v. Hill*, 65 Mo. 87; *State v. Bobbit*, 215 Mo. 43; *State v. Clark*, 145 Iowa, 731; *U. S. v. Chandler*, 65 Fed. 308; *U. S. v. Searcey*, 26 Fed. 435. The courts have very frequently set aside a verdict of conviction of larceny where the proofs were circumstantial and not of such character as to prove, beyond reasonable doubt, that the accused and no other person committed the offense. *Kaiser v. State*, 53 N. W. (Neb.) 610; *State v. Nesbit*, 43 Pac. (Ida.) 66; *McDaniel v. State*, 90 S. W. 504; *Roberts v. State*, 40 S. E. 697; *Hodnett v. State*, 45 S. E. 60. (3) The evidence was insufficient to identify the money found in the possession of defendant as the money of the prosecutor, and the court erred in instructing the

jury on the theory of recent possession of stolen property. Burrill on Circumstantial Evidence, pp. 453, 171, 656; Wills on Circumstantial Evidence, pp. 63, 129; U. S. v. Osgood, 27 Fed. Cas. 15,971a; U. S. v. Candler, 65 Fed. 308; Bush v. Water Co., 43 Pac. 68; State v. Payne, 34 Pac. 320; Doss v. State, 13 S. W. 788; Knoll v. State, 55 Wis. 249; Crane v. State, 111 Ala. 45; State v. Nesbit, 43 Pac. 66.

*John T. Barker*, Attorney-General, and *Stephen K. Owen* for the State.

(1) The first point raised by defendant is that instruction number one is defective. The purpose of instructions in any case, as stated in *State v. Richmond*, 228 Mo. 365, is "To guide a jury of plain men to a correct understanding of the law of the case." If this instruction meets that requirement it is sufficient, as it is not necessary that it should be framed with the technical precision of an indictment. In the present case, the court was telling the jury what was necessary for the defendant to have done in order to have committed the crime of grand larceny. Larceny has been defined since 1866 in Missouri "as the wrongful or fraudulent taking and carrying away by any one of the personal property of another from any place, with a felonious intent to convert the same to his (the taker's) own use, and make it his own property, without the consent of the owner." *State v. Gray*, 37 Mo. 464. The instruction complained of required the jury to find "that defendant did wrongfully take and carry away (the property mentioned) from the possession of Woodson M. Miles, with the intent to fraudulently convert the same to his own use and permanently deprive the owner of the use thereof, without his consent, and that the same was the property of Woodson M. Miles, of the value of thirty dollars or more." What necessary element is lacking in this instruction? It is true the word felo-



niously is not used, but the jury was told that the taking must have been wrongful, with the intent to fraudulently convert the property to defendant's own use and permanently deprive the owner of the use thereof without his consent. Our courts hold that when the word "feloniously" is used in an instruction, it is not necessary to define it. *State v. Scott*, 109 Mo. 226; *State v. Cantlin*, 118 Mo. 100; *State v. Barton*, 142 Mo. 450; *State v. Weber*, 156 Mo. 249. So we take it that if it is not necessary to define the word feloniously, when used, it is not necessary to use it. To wrongfully take and carry away the property of another from his possession with the intent to fraudulently convert the same to his own use and permanently deprive the owner of the use thereof, without his consent, expresses the *animo furandi*, or as the civilians express it *lucricausa*, and that being true, the instruction is sufficient. A very similar instruction was given by the court in the case of *State v. Martin*, 28 Mo. 530. That case has been affirmed in a long line of decisions. In the case of the *State v. Lackland*, 136 Mo. 26, Judge GANTT, commenting on that instruction, l. c. 31, says: "In that instruction was the guilty knowledge that the cattle were not his own; the criminal intent to deprive the owner of his property, and the unlawful and fraudulent conversion to his own use without the consent of the owner." (2) Defendant complains because the court did not give an instruction on circumstantial evidence. It is only in cases where the State seeks to convict on circumstantial evidence alone that it is proper to give such an instruction. That is the rule laid down in one of the cases cited by appellant. *State v. Bobbitt*, 215 Mo. 43. None of the other cases cited by appellant are in point, for the reason that a conviction was sought on purely circumstantial evidence. For instance, in the case of the *State v. Lackland*, 136 Mo. 32, Judge GANTT says: "Now, in this case Mr. Ford never saw the hogs which defendant sold to Rogers and

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State v. Ward.

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Percy. No witness identified these hogs, or either of them, as Ford's hogs. Rogers and Percy did not know Ford's hogs. The case was one of circumstantial evidence, and the State's case depended upon the jury's finding and believing that the facts and circumstances in evidence pointed so strongly to defendant's guilt as to exclude any other reasonable hypothesis." In the case at bar there was proof that at least two of the bills stolen from prosecuting witness Miles, a twenty and a ten-dollar bill, were found in the exclusive possession of defendant, and that fact was sufficient reason for not giving an instruction on circumstantial evidence, and for giving one on the possession of recently stolen property, as will more fully appear hereafter. (3) It is contended that the evidence was not sufficient to identify the money found in possession of defendant as the money of Miles, and therefore the instruction on recent possession of stolen property was erroneous. The following cases will conclusively show that the court did not err in giving this instruction: 25 Cyc. 124; State v. Hoppe, 39 Iowa, 468; Baker v. State, 80 Wis. 416; State v. Griffin, 71 Iowa, 372; People v. Linn, 23 Cal. 150; People v. Wong Chong Suey, 110 Cal. 121; Buckner v. State, 26 S. W. 65; Comm. v. Montgomery, 11 Mass. 534.

ROY, C.—Defendant was convicted of grand larceny. Woodson M. Miles, a lawyer of Union City, Tenn., in company with W. A. Beckham of that place, arrived in St. Louis about 7:30 a. m., August 8, 1912. Miles had in his left hip pocket a leather pocketbook containing three \$20 bills and two \$10 bills, all new and crisp, issued by the Third National Bank of Union City, Tenn. They went into a saloon, got a drink, and Miles took out his pocketbook to pay for the drinks; but Beckham paid, and Miles replaced his pocketbook. They proceeded to take a car at Eighteenth and Market streets. Just

before doing so, Miles felt his pocketbook in his pocket. There was a great crowd pushing and surging to take the car. Beckham went first, followed by two or three others ahead of Miles, who noticed the defendant deferentially yield precedence to him, and noticed that defendant crowded or was pressed close against him behind, and that there was considerable pressure on his pocketbook. Immediately on entering the car Miles felt his pocket and reported to Beckham that his money had been taken. They went down town, got breakfast, and reported the matter to the police. About an hour afterward, Miles saw defendant in the custody of the police. A \$20 bill and a \$10 bill, both new and crisp, issued by said bank, were taken from the person of the defendant by the police at the time of his arrest. On the trial those bills were shown to Miles and he was asked to testify whether they were the bills that he lost on the car. Objection was made on the ground that they had not been properly identified as the same money which was lost and that the question called for a mere conclusion of the witness. The objection was overruled, and he stated that they were the same. He said that he recognized them from the signatures of the officers of the issuing bank, those on the \$20 bill being in red ink, and those on the \$10 bill being in black ink, and from the fact that they were crisp and new, which, as the witness stated, was a rarity in his country. The witness stated that, after reporting his loss to Beckham, he asked the conductor if he saw that young man take his pocketbook. He testified that he recognized the defendant at the time of his arrest and at the trial as the same one who pressed behind him into the car. He testified: "I didn't, of course, see him actually go into my pocket and take the money out, but I saw that he was right behind me, and I know that nobody else was right behind me, and at the same time I felt that pressure right there

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State v. Ward.

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over my pocketbook, and it was a very perceptible noticeable pressure."

Beckham testified that he saw defendant behind Miles as he was entering the car, and that Miles reported his loss and asked the conductor if he saw the young man take his pocketbook. The witnesses further stated that they described the money and the man to the police and gave their address at the Pierce building, and that in about an hour the officer came for them. This witness recognized the defendant as the man at the car. The police officer testified that the bills shown at the trial were the ones which he took from the person of the defendant at the time of his arrest. The bills were read in evidence over the objection of defendant that they were not properly identified as the same bills which were stolen.

Defendant asked an instruction in the nature of a demurrer to the evidence, which was refused. He introduced no evidence.

The court gave the following as its principal instruction: "First: If, upon consideration of all the testimony in the case in the light of the court's instructions, you find and believe from the evidence that at the city of St. Louis and State of Missouri, on or about the 8th day of August, 1912, or at any time within three years next before the filing of the information herein, the defendant, Tom Ward, did wrongfully take and carry away one black leather pocketbook and eighty dollars lawful money of the United States or any part thereof from the possession of Woodson M. Miles with the intent to fraudulently convert the same to his own use and permanently deprive the owner thereof without his consent, and that the same was the property of said Woodson M. Miles and of the value of thirty dollars or more, you will find the defendant Tom Ward guilty of grand larceny and assess his punishment at imprisonment in the penitentiary not less than two years nor more than five years, and unless you so

believe and find from the evidence, you will acquit said defendant of grand larceny." Also an instruction on the presumption arising from the recent possession of stolen property.

Defendant objected to the instructions given on the ground that they did not properly declare the law, or all of the law in the case. When asked if he had further instructions to offer, counsel for defendant said, "No, your Honor, we are going to stand on our demurrer."

The motion for new trial made the point that the trial court did not instruct on all the law in the case, but did not state any particular point on which there had been a failure to instruct.

I. The cases of State v. Richmond, 228 Mo. 362, and State v. Weatherman, 202 Mo. l. c. 9, seem when read superficially to read that the word "felonious" or "feloniously" shall be used in an instruction to describe the intent of the wrongdoer in taking and carrying away the thing stolen. But that is not the meaning of those opinions. The whole history of the subject in this court shows that such is not the case. Judge GANTT wrote the opinion in the Richmond case. He concurred in the opinion in State v. Campbell, 108 Mo. 611, in which it was said, "They should have been told what would have constituted a felonious taking under the law; the taking must have been without right, and with the intention of converting the cow to a use other than that of the owner, without his consent." That learned Judge wrote the opinion in State v. Lackland, 136 Mo. l. c. 31, in which he approves an instruction given in State v. Martin, 28 Mo. 530, which did not contain the word "felonious" or "feloniously," but did require that the taking and carrying away should be knowingly, without the consent of the owner, without any claim of right, and with intent to deprive the

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owner of the property and convert it to defendant's own use, and defraud the owner.

Judge MACFARLANE said in *State v. Scott*, 109 Mo. l. c. 232, that "felonious" originally has no place in an instruction, and that when used it is most frequently but a repetition of what is expressed in other and simpler words. We conclude that the mere fact that the word "felonious" is not used does not invalidate the instruction. The question now arises, Does the instruction properly state the felonious intent? In *State v. Spray*, 174 Mo. 569, which was a robbery case, the instruction, so far as the larceny is concerned, was the same in all its elements as here. It was held sufficient.

It will be observed, from a reading of all the cases, that the element expressed by the words "without any claim of right" is one of the most important ones ordinarily in such an instruction. If such an element is in the instructions in this and the *Spray* cases, it must be found in the words "wrongfully" and "fraudulently." Without deciding whether it is so contained in those words, we hold that, even conceding that it is not, its absence does not in this case constitute reversible error.

The State's evidence was to the effect that defendant picked the pocket of the prosecuting witness in an expert manner; that he was described to the police by his victim and was taken on the hot trail with a part of the money on him. The balance of the money had been disposed of. No defense on the trial was made. There may be many other cases where the omission to require that the taking was "without any claim of right" would be fatal, but this is not one of them. The State's evidence and the defendant's conduct all show there was no claim of right either at the taking or at the trial. There may be a technical error in the instruction, but we are absolutely certain

that such error, if any, did not "prejudice the substantial rights of the defendant on the merits," and, therefore is not reversible.

II. Appellant claims that the evidence as to the identity of the money is not sufficient and cites Burrill on Circumstantial Evidence, p. 453, where it is said:

**Evidence:  
Identity of Stolen  
Bank Notes.**

"Where all that can be proved concerning property found in the possession of a supposed thief, is that it is *of the same kind* as that which has been lost, this will not, in general, be deemed sufficient evidence of its having been feloniously obtained, and some proof of identity will be required. But where the fact is very recent, and the property consists of articles the identity of which is, from their nature, not capable of strict proof, the conclusion may be drawn that the property, being of the same kind, is, in fact, *the same*, unless the prisoner can prove the contrary. Thus, if a man be found coming out of another's barn, and, upon his being searched, corn [or grain] be found upon him, of the same kind as that in the barn, the fact is pregnant evidence of guilt; and cases have frequently occurred where persons employed in carrying sugar or other articles from ships and wharves, have been convicted of larceny upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places; although the identity of the property, as belonging to such and such persons, could not otherwise be proved."

The money found on the defendant was not only the same denominations as that lost, but it had other evidences of identity. It was new and crisp; it was in national bank bills; it was money issued by the Third National Bank of Union City, Tenn., a place comparatively remote, so that fresh, crisp bills, or any bills of its national banks, were not supposed to be common

in the city of St. Louis. As those peculiarities of description increase in number the degree of certainty is multiplied. Then the defendant was at the spot where the prosecuting witness was deprived of his money, and the money was found on him within an hour and a half afterward. The evidence of identity was ample to take it to the jury.

III. It is said by appellant that there should have been an instruction on the subject of circumstantial evidence. In the motion for a new trial, the defendant made the point that the court did not instruct on all the law in the case, but at no time was the trial court's attention called specifically to the failure to instruct on circumstantial evidence.

Instructions: All  
the Law of the  
Case: Appeal:  
Circumstantial  
Evidence.

It was held in *State v. Conway*, 241 Mo. 271, that where the particular point on which the trial court has failed to instruct is not mentioned in the motion for a new trial it comes too late in this court. We are, however, in any event, bound to see that no injustice is done by such omission. We can see no way in which such an omission prejudiced the defendant. In addition to what is above said, the case did not depend alone on circumstantial evidence. The direct evidence in the case identifies the defendant as the party who pressed against Miles at the time the pocketbook was taken, and identifies the stolen money found on the defendant as that taken from Miles. Such being the case, the trial court was not required to instruct on circumstantial evidence.

Finding no reversible error in the record, the judgment is affirmed. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of *Rox, C.*, is adopted as the opinion of the court. All concur. *Faris, J.*, in result.



## MERAMEC PORTLAND CEMENT AND MATERIAL COMPANY, Appellant, v. ROBERT KREIS.

Division Two, July 14, 1914.

**SPECIFIC PERFORMANCE: Parol Evidence: Statute of Frauds.**

Specific performance is refused where there is no description, in letters and memoranda, to satisfy the Statute of Frauds, other than "land south of the Missouri Pacific Railroad tracks," and "forty-some-odd acres of bottom land you have adjoining us [plaintiff] at Sherman, Missouri." Parol evidence, when admitted to disclose the situation of the parties when the writings were made shows only that defendant did own land adjoining a tract of plaintiff's, but not necessarily situated at Sherman, and, even though the evidence had shown such location, it appears that defendant's tract contained 72.95 acres, and it would be impossible to ascertain from the memorandum what portion should be taken to compose the forty-odd acres mentioned.

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney*, Judge.

**AFFIRMED.**

*Collins, Barker & Britton* and *C. K. Rowland* for appellant.

(1) The memorandum in this case is sufficient. Sec. 2783, R. S. 1909; 20 Cyc. 253; *Springer v. Klein-sorge*, 83 Mo. 157. (2) Memorandum of a contract of sale and conveyance of land, although signed only by the party to be charged when sufficiently clear and certain in its terms, affords a competent basis for a suit for specific performance. *Mastin v. Grimes*, 88 Mo. 478; *Moore v. Thompson*, 93 Mo. App. 348; *Cable v. Jones*, 179 Mo. 606; *Real Estate Co. v. Spelbrink*,

211 Mo. 671. (3) While parol evidence is not admissible to piece out the memorandum, it is clearly admissible for the purpose of identifying the property described in the memorandum if reference is made to some "external standard," by which the property can be located. *Darnell v. Lafferty*, 113 Mo. App. 301; *Sailor v. Gilfillan*, 73 Mo. App. 152; *Springer v. Kleinsorge*, 83 Mo. 157; *Smith v. Wilson*, 160 Mo. 666; *Bollinger County v. McDowell*, 99 Mo. 637; *Black v. Crowther*, 74 Mo. App. 483; *Tetherow v. Anderson*, 83 Mo. 97; *Cravens v. Pettit*, 16 Mo. 210. (4) Where the memorandum is sufficient to meet the requirements of the Statute of Frauds, the acceptance may be oral. *Waterman Spec. Perf.*, sec. 137; *Gradle v. Warner*, 140 Ill. 123; *Brown Stats. Frauds*, sec. 345a; *Farwell v. Lowther*, 18 Ill. 252; *Black v. Crowther*, 74 Mo. App. 480. (5) It is not necessary that the memorandum upon which a party may be charged shall be a single document. Such memorandum may be made up of a number of different papers, such as letters, etc., where there is a sufficient reference made to identify and connect them, and one or more of them is signed by the party to be charged. *Peycke Bros. v. Ahrens*, 96 Mo. App. 456; *Cunningham v. Williams*, 43 Mo. App. 629; *Moore v. Mountcastle*, 61 Mo. 424; *Gurley-Burnham Co. v. Capen*, 23 Mo. App. 301; *Heideman v. Wolfstein*, 12 Mo. App. 366; *Swallow v. Strong*, 85 N. W. (Minn.) 942; *Charlton v. Real Estate Co.*, 69 L. R. A. (N. J. Eq.) 394. (6) Even where the memorandum attempts to make time of the essence of the contract, by fixing a definite date for the acceptance of the offer, if the parties continue to deal together after the expiration of the time fixed, this amounts to a waiver of the element of time. 1 Story Eq. Jur., sec. 776; *Mastin v. Grimes*, 88 Mo. 485; *Melton v. Smith*, 65 Mo. 322; *Mix v. Baldac*, 78 Ill. 217.

*George M. Block and Frank B. Coleman* for respondent.

The memorandum in this case is not a sufficient compliance with the Statute of Frauds to constitute a binding contract between appellant and respondent or entitle appellant to any relief. (1) Because there was no sufficient description of the premises sought to be purchased. *Sec. 2783, R. S. 1909; Fox v. Courtney*, 111 Mo. 147; *King v. Wood*, 7 Mo. 389; *Whaley v. Hinchman*, 22 Mo. App. 483; *Schroeder v. Taaffe*, 11 Mo. App. 267; *Weil v. Willard*, 55 Mo. App. 376; *Johnson v. Fecht*, 94 Mo. App. 605; *Johnson v. Fecht*, 185 Mo. 335. (2) Because there is no sufficient description of the purchaser. *Rucker v. Harrington*, 52 Mo. App. 481; *Toms v. Bayse*, 65 Mo. App. 30; *Carriek v. Mincke*, 60 Mo. App. 140. (3) Because there is no sufficient certainty as to the terms of the alleged contract. *Kelly v. Thuey*, 143 Mo. 435; *Ringer v. Holtzelaw*, 112 Mo. 522; *Wendover v. Baker*, 121 Mo. 290; *Ice Co. v. Heinze*, 102 Mo. 245; *Mastin v. Hally*, 61 Mo. 196; *Taylor v. Williams*, 45 Mo. 80; *Boyd v. Paul*, 125 Mo. 14. (4) Because the memorandum being scant in measure under the Statute of Frauds it cannot be pieced out by verbal additions. *Boyd v. Paul*, 125 Mo. 14; *Ringer v. Holtzelaw*, 112 Mo. 519; *Kelly v. Thuey*, 143 Mo. 422; *Reigert v. Coal & Coke Co.*, 217 Mo. 160.

WILLIAMS, C.—Plaintiff corporation, by action for specific performance, seeks to compel defendant to convey to it a tract of land situated in St. Louis county, Missouri, described as follows:

Specific  
Performance:  
Parol Evidence.

“Part of the southwest quarter of section 15 and of the northwest quarter of section 22 in township 44 north of range 4 east, containing 39 acres more or less, and being particularly bounded and de-

scribed as follows, to-wit: Commencing at the point where the south boundary line of the present right of way of the Missouri Pacific Railroad intersects the east boundary line of the southwest quarter of section 15 aforesaid, and running thence in a westwardly direction with the south boundary line of said right of way to the intersection thereof with the west boundary line of 'Castle Woods' subdivision, as per plat thereof recorded in a plat book No. 9, at page 24, in the recorder's office of the city of St. Louis; thence running south with the west boundary line of said Castle Woods to the middle of the main channel of the Meramec River; thence down the middle of the main channel of said stream, with the meanders thereof, to the east boundary line of the southwest quarter of said section 15, and thence north with the east boundary of said southwest quarter of said section 15 to the place of beginning; bounded on the north by the south line of the present right of way of the Missouri Pacific Railroad, on the south by the middle of the channel of the Meramec River; on the east by the east line of the southwest quarter of section 15 aforesaid, and on the west by the west line of the subdivision known as 'Castle Woods' as per plat thereof recorded as aforesaid."

On May 31, 1908, defendant delivered to one Lewis (who was then in the employ of the plaintiff), the following unsigned paper:

"No. 1, \$6000 (six thousand) with land south of Miss. Pac. R. R. tracks, fishing rights for Clubhouses members and Oil & Gas rights reserved, also piping water over land.

"No. 2, \$5000 (five thousand) for bar and track purpose, without any land.

"No. 3, \$3000 (three thousand) for privilege of letting Comp. Plant on my place & for running tracks over my land for 15 (fifteen) years after 15 years Comp. has to pay me \$250 (two hundred & fifty) doll.

a year annually in advance. I reserve the Right to ship Sand, Gravel & Wood over these & Comp. tracks on Frisco R. Road, if bridge is build, if not on Miss. Pac. R. Road. I to pay 25 cents to Comp for each loaded car.

"No. 4, 50 Cents (fifty) Royalty for each Car of Sand & Gravel, \$3000 (three thousand) Cash, which is to be repaid to Comp. from Royalties, I to get 25c./ for each Car and 25c./ to be kept back untill the \$3000 are repaid, Then Comp. has to pay me 50 cents, A way to be devised to keep exact Count of each car load taken out.

"These offers to be good only for six (6) days untill 6th of June, 1908.

"St. Louis, May 31, 1908."

Said Lewis delivered this paper to Mr. Boyd, the vice-president and general manager of plaintiff company. On June 2, said Boyd wrote to defendant the following letter:

"Meramec Portland Cement & Material Co.

St. Louis, Mo., June 2, 1908.

Mr. Robert W. Kreis,  
Jennings, Missouri.

Dear Sir:

Please call at the office at your earliest possible convenience to talk over the matter of purchasing the forty-some-odd acres of bottom land you have adjoining us at Sherman, Missouri.

Please advise me, as soon as possible, when we may expect you, and oblige,

Yours very truly,

T. P. Boyd,

Vice-Pres. & Gen'l Mgr."

On June 3, defendant wrote to said Boyd in answer to the above letter as follows:

“Jennings, June 3, 1908.

Mr. Frank P. Boyd,  
St. Louis, Mo.

Dear Sir:

Received your letter dat. June 2. I am unable to see you, as our Works are going to close down for 10 days for repair, commencing next Monday and we have to work overtime to finish by Saturday eve. I have given Mr. Lewis the 4 diff. propositions that I would accept last Sunday and told him, that they were good untill Sat. June 6th after which time I would turn the business over to Lawyer Mr. Block & Comp. in the Carrolton Bldg, Mr. Block wanted to take it right away, but I did not like to do it untill I heard from your Comp. It does not cost me anything, as they will handle it on a Commission of what they get over \$5000. I will under the circumstances extend the time untill Monday eve, June 8th, but in the meantime let me know, which proposition you will accept. As there is no use to argue any points or price, as I have set them down and intend to stick to them. If you come to any conclusion let me known and I will come Monday with my Lawyer and fix it up. If any one of your Comp. want to see me, you can find me at M. A. Seed Dry Plate Works, Woodland, Mo., on the Wabash R. R. between 12 and 1 o'clock. I think it is unnecessary to mention that it will be to your Comp. benefit to have it settled on or before June 8, 1908.

I remain

Resp. yours, ROBT. KREISS.”

On June 2, defendant wrote to said Lewis the following postal card.

“St. Louis, June 2, 1908.

Mr. W. J. Lewis,  
St. Louis, Mo.

Dear Sir:

I hardly think it necessary to see you as you have the propositions to submit to the Comp. I am posi-

tive the Comp. knows all about it. If they are smart they will loose no time to write me about the offers which I numbered, as Saturday is the last day & after that I have nothing to do with it any more.

truly yours,

ROBT. KREIS."

On June 10, defendant wrote to said Lewis the following postal card:

"St. Louis, June 10, 1908.

Mr. W. J. Lewis,  
St. Louis, Mo.

Dear Sir:

Please do not wait for me as I have disposed of my property South of R. R. Tracks. I remain,

Resp. yours,

ROBT. KREIS."

Said postal card was addressed to "Mr. W. J. Lewis Meramec Portland Cement & Mat. Co., 507 Nat. Bank of Com. Bldg., St. Louis, Mo."

The above letters and papers constitute all of the written memoranda concerning the transaction. At the instigation of Mr. Boyd, a Mr. Terpening, who was at that time one of the directors in the plaintiff company, arranged for a meeting with defendant at the Southern Hotel in St. Louis on Saturday evening, June 6th. The defendant and his brother came to the hotel and there met Mr. Terpening. After the parties had been in consultation some considerable time, Mr. Boyd joined the meeting. At this meeting Mr. Terpening made several offers to the defendant for his property, but it appears that all of these offers were less than six thousand dollars. Both Mr. Boyd and Mr. Terpening urged defendant's brother to use his influence to cause defendant to accept the propositions there made by Mr. Terpening. The parties were unable to cause defendant to accept the propositions there made by Mr. Terpening and Mr. Terpening told

defendant to "take his land and go." Mr. Boyd testified that had Mr. Terpening been able to purchase the land from the defendant on that night that the purchase would have been made for the plaintiff company. Mr. Boyd further testified that he attempted to get in communication with defendant on June 8 by telephone; that he called up the Seed Dry Plate Company and inquired for defendant at three different times on June 8 but was told that defendant was not there. It does not appear from the evidence for what purpose Mr. Boyd desired to communicate with defendant or what information he desired to convey to him over the telephone. Witness Brown testified for plaintiff that on June 9, defendant came down to the river where witness was fishing and that another gentleman was also present and that defendant said: "I seen Captain Lewis on the train, and he asked if he could reach me today by a letter or anything, and he said, 'I told him yes.' They were looking for me yesterday, but I instructed my wife not to answer any telephone or anything, and they asked me this morning why I didn't come down to the office yesterday, and I said I have fooled with you enough and I won't fool with you any more; that is the reason I didn't come down."

This witness further testified: "And we stood and talked awhile and went back over his land and up to his house. Then I came back down to the river again and right away after dinner Mr. Lewis came and this man said, 'How would your wife reach you with a letter or any way?' He says, 'Well, I have got that fixed, if there is anything turns up he can't find me.' " That thereupon defendant and Mr. Lewis went away together, talking. Witness Lewis testified that on June 9 he went with the defendant out to the land and witness asked defendant if that was the land he proposed to sell for six thousand dollars and the defendant said it was and thereupon witness told



defendant that he would accept the offer. That witness wanted defendant to go to the office that night so that witness could pay defendant one hundred dollars but defendant refused to accept one hundred dollars down and wanted five hundred dollars down. The witness then wrote on a card his understanding of the agreement and read it to the defendant and asked him if that was what he understood; but that the defendant said: "That isn't necessary; I will be at the office of the Meramec Portland Cement & Material Company at two o'clock to meet you." Witness further testified that defendant failed to keep his agreement to meet him at two o'clock on the following day and that he waited for the defendant at the office until after five o'clock. Witness further testified that he was acting for the plaintiff company on June 9 but that he told defendant he was accepting the offer personally. On June 11, witness received from defendant a postal card stating that defendant had disposed of the property. On June 11, Mr. Boyd, acting for the plaintiff company, after learning that defendant had disposed of the property, in company with another officer of the company, tendered defendant six thousand dollars in currency; that at the time the tender was made the representatives of the plaintiff told defendant that the tender was made "in payment of the thirty-nine acres of your land at Sherman, Missouri." That defendant refused to accept the tender, saying: "I can't take it." The evidence on the part of plaintiff further tended to show that defendant did not own any land south of the Missouri Pacific tracks in St. Louis county other than the land in question in this suit and that there were seventy-two acres in the tract, and that this tract adjoined that of plaintiff's but the location of plaintiff's said tract does not appear from the evidence. The court found the issues in favor of defendant and

dismissed plaintiff's petition. Thereupon plaintiff duly perfected his appeal to this court.

It is first contended by appellant that the foregoing letters, together with the unsigned paper of May 31, were sufficient to satisfy the requirements of section 2783, Revised Statutes 1909, the section of the Statute of Frauds applicable to transactions of this character, and that therefore a sufficient foundation exists upon which to base its action for specific performance.

We are unable to agreed with this contention. It will be noticed that the only written words which in any manner throw light upon the description of the property sought to be affected are the words, "land south of the Miss. Pac. R. R. tracks," contained in the unsigned paper of May 31, and the words, "forty-some-odd acres of bottom land you have adjoining us at Sherman, Missouri," contained in the letter of plaintiff's vice-president to defendant under date of June 2d.

In the case of *Fox v. Courtney*, 111 Mo. 147, the land was described as the "ground lying between Missouri avenue and Sixth street on the east side of Grand avenue," and it was held that the description was not sufficiently certain to satisfy the Statute of Frauds. In that case the court quoted with approval the following rule: "The writing required by the statute 'must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.' . . . 'The writing must be a guide to find the land, must contain sufficient particulars to point out and distinguish the tract from any other.' " [Id., l. c. 150.]

The rule that parol evidence is not admissible to supply omitted parts of the memorandum or contract coming within the scope of the Statute of Frauds is

correctly stated and fully discussed in the case of *Reigart v. Coal & Coke Co.*, 217 Mo. 142.

The rule here applicable is also stated in *Pomerooy on Specific Performance of Contracts* (2 Ed), par. 90, as follows:

"The subject-matter of the agreement must all be included in the memorandum, and must be described with sufficient exactness to render its identity certain upon the introduction of extrinsic evidence simply disclosing the situation of the parties at, and immediately before, the time of making the contract. Parol evidence is admissible to show the surrounding circumstances and position of the parties, and thus to explain the meaning and application of the descriptive language, and thereby to identify the subject-matter; and all technical terms and other phrases used in a special sense, may be thus, as it were, translated. But if, by this means, the subject-matter is not certainly ascertained, parol evidence cannot be used to go farther and actually supply a substantive part of the agreement, which has been entirely omitted from the memorandum or insufficiently expressed. . . . [or] The description of the subject-matter may be wholly or partially contained in an auxiliary writing, which, if referred to in such a manner as to establish the connection, becomes a constituent part of the memorandum."

Allowing appellant the full benefit of the above rule, we find that the parol evidence disclosing the situation of the parties at the time the memorandum was made shows that defendant did own a tract of land which adjoined a tract owned by plaintiff company but whether or not this tract belonging to plaintiff was located at Sherman, Missouri, the evidence does not disclose. And furthermore, even if the evidence had so shown, the description of the land sought to be affected would still remain indefinite and uncertain for the reason that the evidence shows that

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Lamar Township v. City of Lamar.

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defendant's said tract contained 72.95 acres and it would be impossible to ascertain from the memorandum what portion of the above tract should be taken to compose the "forty odd acres" therein mentioned.

Several other points, some of which appear to be based upon substantial ground, are suggested by respondent in justification of the decree, but since the conclusion reached on the point above discussed is decisive of the case, it becomes unnecessary to give further consideration to points which also may have justified the action of the trial court in finding the issues for defendant.

The judgment is affirmed. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

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LAMAR TOWNSHIP v. CITY OF LAMAR,  
Appellant.

Division Two, July 14, 1914.

1. **TAXATION: Void Levy: Raised by Recipient.** In a suit by a township to recover the amount of road and bridge taxes collected by the township collector and county treasurer as *ex officio* county collector and paid to the city situate within the township, in the honest belief that such taxes belonged to the city, a defense set up by the city that the levies under which the taxes were collected were void, should be stricken out, on motion. The city cannot justify its right to hold money collected as taxes, on the theory that the levy under which they were collected was void.
2. ———: **To Whom Taxes Belong: Depends on Law.** To whom public taxes belong and the disposition that can lawfully be made of them, depends on the law, and not upon any idea of fairness.

3. ———: **Road and Bridge Taxes: Collected by Township: Division with City.** The amendment of 1908 to section 22 of article 10 of the Constitution gave to township boards in counties having township organization the right to levy a tax of twenty-five cents on the hundred dollars' valuation for road and bridge purposes, to be used for no other purpose; and the Legislature has no authority to enact a statute taking from the township any part of the tax so collected, and any statute that authorizes a division of said taxes with a city situate within the township would be unconstitutional; and Sec. 11767, R. S. 1909, authorizing such division, is unconstitutional.
4. ———: **Paid to City by Mistake of Law.** A payment of road and bridge taxes belonging to a township, collected by a township collector and the county treasurer as *ex officio* county collector, made to the treasurer of the city situated in said township, under the mistaken view that under the law said taxes belonged to the city, is no bar to a recovery by the township of the money so paid. The rule that a payment made in mistake of law cannot be recovered, does not apply to a municipality. [Distinguishing *Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264, and *State ex rel. v. Hawkins*, 169 Mo. l. c. 618.]
5. **PAYMENT: Mistake of Law: Public Officer.** A public officer, charged with the collection of public taxes, is not a general agent of the municipality, but only an agent for the purposes defined by law, and of the limitations of his agency the public is bound to take notice. He cannot give away county funds, or disburse them contrary to law, and any payment of them made by him, unless authorized by valid law, even if made under the mistaken and honest belief that the law authorizes it, is not binding upon the municipality, unless the element of estoppel or some other inexorable principle of law intervenes to bar the municipality's right to recover back the money so paid.

Appeal from Barton Circuit Court.—*Hon. B. G. Thurman*, Judge.

**AFFIRMED.**

*J. B. McGilvray* and *Edwin L. Moore* for appellant.

(1) The petition does not state facts sufficient to constitute a cause of action. It may state a case

against the collector, but not against the city which innocently received the money. 27 Cyc. 865; Case v. Packing Co., 105 Mo. App. 172. (2) It is against equity and the natural justice of the thing for the plaintiff to recover in this case. Hethcock v. Crawford Co., 200 Mo. 177. (3) These moneys were not sought to be levied, if at all, under the "special road and bridge tax" of section 11769 which follows the constitutional amendment of 1908, but under section 11767. Green City v. Martin, 237 Mo. 483. (4) There was really no levy for any of the years involved, and Lamar had just as much right to apply the money on the public highways as the township had. Secs. 11705, 11709, 11420, 11582 and 11772, R. S. 1909. (5) "Township charges" of 11705 are broad enough to include road and bridge taxes. State ex rel. v. Piper, 214 Mo. 446. (6) The mutilated and spoliated records of the township board were not admissible; such records should only be written up "from memoranda or minutes made by the secretary." Some of these important entries were made by the clerk years afterward and rested upon nothing more substantial than his memory. "An omission in a record cannot be supplied from conjecture, but only where the context shows clearly what words are to be added." Lincoln v. Chapin, 132 Mass. 472; 34 Cyc. 590; State ex rel. v. Wray, 55 Mo. App. 655; 37 Cyc. 976; State v. Railroad, 135 Mo. 77. (7) Counsel will say a levy was unnecessary: He seemed to think it was necessary in drawing his petition, and why cannot we attack plaintiff's title? Defendant may do so in replevin, conversion, ejectment, etc. Young v. Glasscock, 79 Mo. 574; Eidson v. Hedger, 38 Mo. App. 55; Kirk v. Kane, 87 Mo. App. 281. (8) It was not necessary that defendant show a better title than plaintiff; if as good, it will be sufficient. 27 Cyc. 875; 4 Wait's Actions & Defenses, 511; Bank v. Inv. Co., 160 Mo. App. 380. (9) Money paid under a mistake

of law cannot be recovered back. *Schell City v. Mfg. Co.*, 39 Mo. App. 264; *Sparks v. Jasper Co.*, 213 Mo. 237; *State ex rel. v. Ewing*, 116 Mo. 137; *State ex rel. v. Shipman*, 125 Mo. 486; *Scott Co. v. Leftwich*, 145 Mo. 34; *State ex rel. v. Hawkins*, 169 Mo. 618; *Williams v. Carroll Co.*, 167 Mo. 15; *Morgan Park v. Knopf*, 199 Ill. 444; *Badeau v. U. S.*, 130 U. S. 439; 30 Cyc. 1315. (10) Under section 2778 a suit on an implied contract, as that alleged here, cannot be maintained against a city. *Perkins v. School District*, 99 Mo. App. 483; *Savage v. City*, 83 Mo. App. 323; *Schell City v. Mfg. Co.*, 39 Mo. App. 264; *Crutchfield v. Warrensburg*, 30 Mo. App. 456; *Anderson v. Ripley Co.*, 181 Mo. 58; *Hook v. City*, 144 Mo. App. 144.

*H. W. Timmonds* for respondent.

(1) All moneys arising from the special road and bridge tax shall be appropriated by the township board of directors and there can be no division of it between the city and the township. *Green City v. Martin*, 237 Mo. 474; *State ex rel. v. Everett*, 245 Mo. 714; Sec. 22, art. 10, Constitution. Sec. 11767, R. S. 1909, is the only authority for a division of taxes between the city and the township and the Supreme Court has held in *Green City v. Martin* and *State ex rel. v. Everett*, *supra*, that this section does not apply to the taxes involved in the case at bar. Cities of the fourth class "have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city." Sec. 9400, R. S. 1909. And are empowered to levy and collect taxes on all property within the city limits. Sec. 9400, R. S. 1909. A township is a political subdivision of a county for local governmental purposes and is in a sense a *quasi* corporation. County roads and bridges are matters of general or public concern, while city streets, sidewalks and alleys have a local and peculiar or cor-

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porate character. 1 Dillon on Mun. Corp. (3 Ed.), secs 66 and 74; Jefferson Co. v. St. Louis Co., 113 Mo. 625. The funds in question can only be applied to the roads and bridges in th township outside of the incorporated city of Lamar because the city is required by law to maintain their streets and the township has no control over them; the city has power to levy and collect taxes and to appropriate money for maintaining their streets; they act independently of the township; an appropriation of any part of these road and bridge taxes to be used upon the streets of the city of Lamar is a gift or grant within the meaning of the Constitution and any act of the Legislature authorizing any such gift or grant is unconstitutional and void. Sec. 46, art. 4, Constitution; State ex rel. v. County Court, 142 Mo. 575. (2) Where money has been received by a collector for taxes, the money after its reception by the collector, is public money and belongs to the State, county or township for whose use it was collected. Davis v. Bader, 54 Mo. 168; State ex rel. v. County Court, 142 Mo. 584. And public moneys can only be paid out for the purposes and in the manner prescribed by law. (3) The general rule of the common law is that a mistake of law is no ground for relief because "ignorance of the law excuses no one;" as a general proposition, this rule exists in equity, but like many other general rules, it exists with qualifications. Bispham's Equity, sec. 187; Story's Equity (12 Ed.), sec. 111; Nelson v. Betts, 21 Mo. App. 229. Where a party acts upon the misapprehension that he has no title at all in the property, it seems to involve in some measure a mistake of fact; that is, of the fact of ownership, arising from a mistake of law, and courts will grant relief. Story's Equity (12 Ed.), secs. 120, 122, 123, 129, 130, 137, 138c, 138f. Relief is sometimes given also in cases of surprise; that is, where parties have entered into arrangements unadvisedly and improvidently, and without



due deliberation; so, also in some cases where the law is confessedly doubtful, and the question is one about which ignorance may well be supposed to exist. Bispham's Equity, sec. 188; Story's Equity (12 Ed.), sec. 134. Where a mistake of law is attended by circumstances that render it inequitable for the other party to take advantage of it, equity will interfere and grant relief. *Griswold v. Hazard*, 141 U. S. 260; *Leach v. Cowan*, 140 S. W. (Tenn.) 1077. While recognizing the rule that equity will not extend relief against a mistake of law, courts are ready and even astute to seize upon any element of fact as sufficient in connection with the mistake of law to justify granting the relief. 16 Cyc. 74; *McNaughten v. Partridge*, 38 Am. Dec. (Ohio) 731; 16 Cyc. 74. Money paid by one under mistake of his rights and his duties, which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, may be recovered back in an action for money had and received, whether such mistake be one of fact or of law. *Northrop's Executors v. Graves*, 50 Am. Dec. (Conn.) 264; *Culbreath v. Culbreath*, 50 Am. Dec. (Ga.) 375. (4) There is a difference in paying private money and paying public money by mistake; public moneys cannot be disbursed or given away contrary to law and disbursement by a public officer, contrary to law, is invalid. *Morrow v. Surber*, 97 Mo. 161; *Campbell v. Clark*, 44 Mo. App. 253. The rule is that the payment of public moneys by a public officer, by mistake of law, especially when made to another officer, may be recovered back. 30 Cyc. 1315; *Ada County v. Gess*, 43 Pac. (Idaho) 71; *Heath v. Albrook*, 98 N. W. (Iowa) 619; *Allegheny v. Grier*, 36 Atl. (Pa.) 353; *Ellis v. State Auditor*, 65 N. W. (Mich.) 577. (5) The obligation to do justice rests upon all persons, natural and artificial. and if a municipality obtains the money, or property of others without authority or by mistake, the law, independent of any

statute, will compel restitution or compensation. *Wood v. Kansas City*, 162 Mo. 312; 15 Am. & Eng. Ency. Law (1 Ed.), p. 1083; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676; *Louisiana v. Wood*, 102 U. S. 294; *Chapman v. Douglas Co.*, 107 U. S. 348; *Morville v. Track Society*, 123 Mass. 129; *Hathaway v. Cincinnati*, 62 N. Y. 434; *Nelson v. Mayor*, 63 N. Y. 544; *Dillon on Municipal Corp.* (3 Ed.), sec. 460; *Armstrong Co. v. Clarion County*, 5 Am. Rep. (Pa.) 368. "If a municipal corporation received the money or property of another by mistake or without authority of law, it is its duty to restore such money or property to the true owner, or, if used by it, to render an equivalent therefor, from which obligation the law implies a promise so to do." 20 Am. & Eng. Ency. Law (2 Ed.), 1158; *Argenti v. San Francisco*, 16 Cal. 256; *Galloway v. Milledgeville*, 48 Ga. 309; *Cary v. East Saginaw*, 79 Mich. 73; *M. E. Church v. Vicksburg*, 50 Miss. 601; *Wood v. Kansas City*, 162 Mo. 303.

FARIS, J.—This is an appeal from the circuit court of Barton county. We get jurisdiction because the case involves a construction of the revenue laws. [*State ex rel. v. Adkins*, 221 Mo. 112; *State ex rel. v. Hawkins*, 169 Mo. 615; *St. Louis & San Francisco Ry. Co. v. Gracy*, 126 Mo. 472; *Morrow v. Surber*, 97 Mo. 155.]

The learned trial judge with commendable zeal prepared a written statement of the facts, as also his opinion of the law. After examining his findings and conclusions with great care, we have reached the opinion that his views are sound. We therefore adopt his statement of the facts and his opinion as to the law as our opinion herein, adding thereto some supplemental views of our own upon a question of first impression in our courts. This opinion of the trial judge is as follows:

“This is an action by Lamar township, one of the municipal townships of Barton county, against the city of Lamar, a city of the fourth class—the corporate limits thereof being wholly within Lamar township. The petition contains three counts, and seeks to recover certain road and bridge funds levied and collected in Lamar township for the years 1909, 1910 and 1911, and, by the township collector and the county treasurer as *ex-officio* collector, paid to the treasurer of the city of Lamar. The answer admits the corporate existence of plaintiff and defendant, contains a general denial as to other allegations, and specifically denies that any such taxes were ever legally levied; and alleges that the pretended levies are void; and, the further defense that if any such taxes were collected and paid to defendant the same were paid under a mistake of law, and for that reason plaintiff is not entitled to recover. There is not much controversy about the facts.

“The plaintiff, Lamar township, undertook to levy a road and bridge tax of ten cents on the \$100 for the year 1909, twenty cents on the \$100 for each of the other years, 1910 and 1911. The record of the township board with reference to these levies is brief, and it appeared in evidence that the amounts of the levies for some of the years were not written in until long after the proceedings of the board were had, and some amendments or corrections in the record were made after this suit was brought. It was shown that the clerk of the board sent to the county clerk a certificate of each levy and the taxes were extended on the tax books and collected by the township collector and *ex-officio* collector. That all of such taxes collected within the corporate limits of the city of Lamar were paid to the treasurer of the city of Lamar, and used by the city. At that time the city did not keep a separate street fund, or at least for the first two years, but sums equal to and in excess of the amounts

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so paid into the city treasurer were expended on the streets of the city of Lamar. Settlements were made with the township board by the collector and *ex-officio* collector, and the township board knew, or should have known, of the payments to the city of the portion of the road and bridge tax collected within the corporate limits of the city. The fact is, that all thought, under the law, it was the duty of the collector to pay all road and bridge taxes levied by Lamar township and collected from citizens living within the corporate limits of the city of Lamar to the city treasurer, until after the decision of the Supreme Court in the case of *Green City v. Martin*, 237 Mo. 474. The taxes so collected and paid to the city treasurer for the use of the city are as follows: 1909, \$714.30; 1910, \$1455.30; 1911, \$1389.81. So if the plaintiff is entitled to recover in this action the judgment should be for these sums and interest from date of demand, August 5, 1912.

“There was a motion filed by the plaintiff’s counsel to strike out the defense of void levy, etc., but not having been taken up before the case was called for trial, it was agreed by counsel that the trial might proceed and the questions involved in the motion determined in passing on the case, as the testimony was short and it was more convenient to argue the motion with the case on its merits.

“I. The first question presented by the record is raised by the motion of the plaintiff to strike out the defense of ‘void levy.’ Can the defendant city hold money collected from the taxpayers  
**Void Levy.** by Lamar township because the levy upon which the collection was made is void? The court is of the opinion that the defendant city cannot avail itself of this defense. The taxes were actually extended on the tax books and regularly collected by the collector of the township, and thereby become

public funds for the purpose for which collected and it does not lie in the mouth of any one but a taxpayer to dispute the validity of the levy. If the defendant city can defend the suit on that ground, the collector could have pocketed all the taxes so collected and defeated a suit for the same or a prosecution for embezzling the funds. The contention carried to its legitimate results would enable the custodians of the funds of these municipalities to embezzle them with impunity, for the records made by persons not learned in the law and with little idea of forms by these municipalities rarely measure up to the full requirements of the law. This defense should have been stricken out on plaintiff's motion.

“II. Do these taxes levied and collected by Lamar township, from the citizens living within the corporate limits of the city, belong to the plaintiff township or defendant city? That it would seem fair for the city of Lamar to have them, all must admit.

**To Whom Taxes Belong.** It is so recognized by our Legislature, as shown by their repeated efforts to pass and in passing such law. To whom public funds belong and the disposition that can lawfully be made of them, depends upon the law and not upon sentiment or anyone's idea of fairness. So it becomes the court's duty to be governed by the law and not by personal preference of the individual who discharges the judicial function.

“In the year 1908 the people adopted an amendment to the Constitution designated as section 22, article 10. Under section 11 of article 10, the limit of the county tax is fifty cents on the \$100, and this includes road tax and township tax, the total limit being fifty cents on the \$100. The county levies are generally as much as forty cents on the \$100. The record does not disclose the levies in 1909, 1910 and 1911, but the constitutional amendment became necessary

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in order to have a sufficient road and bridge fund to keep up the work on the public roads. This section gives the right to the township board to levy a tax of twenty-five cents on the \$100 for 'road and bridge' purposes, and it provides that such tax when levied and collected shall be used 'for no other purpose whatever;' the only authority the township board had for levying the twenty cents on the \$100 was this section 22 adopted as an amendment to the Constitution. Before the adoption of this section Lamar township could not have levied more than fifteen cents on the \$100. [Green City v. Martin, 237 Mo. 474.]

"It is clear under this section of the Constitution (Sec. 22) that of the road and bridge tax therein authorized to be levied and collected by Lamar township, no division could be made with the city of Lamar. It is required to be used for the roads and bridges within the township, and not upon the streets of the city. In the face of this constitutional prohibition no law could be passed by the Legislature taking away from the township one cent of the public funds authorized to be levied under it. This is not only clear from the express words of the Constitution, but it has been so decided by our Supreme Court in the Green City case. It is contended by defendant's counsel that the road and bridge tax levied, collected and sought to be recovered by the plaintiff's suit is not the road and bridge tax contemplated or provided for by this constitutional amendment; that it is the road tax provided for by section 11767 passed by the Legislature in 1909, and it is therein expressly provided that the part collected from citizens within the corporate limits of the cities and towns shall be turned over to the treasurer of such cities and towns. There are two reasons why the court cannot adopt this construction. In the first place, this section of the statute was not in force when the levy was made in April, 1909, and the levy for all the years are sub-

stantially the same. For the levy of 1909 the court is forced to accept the constitutional amendment in 1908, for authority to warrant the township board in making the levy; but a more cogent reason is found in the fact that under the construction placed on section 46 of article 4 of the Constitution no such division can be made and a statute that authorizes it is void. [State ex rel. v. County Court, 142 Mo. 575.] The statute under consideration in that case was section 7903 passed in 1897. [Laws 1897, p. 218.] This act authorizes counties to pay to cities and towns taxes collected within the corporate limits of such cities and towns to such cities and towns for improvements of the streets. The Supreme Court, speaking through Judge BURGESS, calls attention to the fact that counties and cities are independent of each other in their governmental functions; that the duties and obligations of cities and counties in building and maintaining roads and streets are very different. That decision is not based on the fact that it was sought to divert a part of the public revenue of the county, and not a part of the road tax of the county. Had that been the basis of the decision, the court would not have expressly held the statutes unconstitutional, but would have held that the city of Kirkwood sought to obtain funds which could not be set apart and used for that purpose by the court. It is suggested by the counsel for defendant with much force, that the Supreme Court in the Green City case had recognized the validity of section 11767, Revised Statutes 1909, and that case could have been disposed of without going into the intricate distinction as to the kind of road tax provided for by the constitutional amendment and by section 11767. The fact that the point is nowhere raised by the brief of the counsel or referred to by the court, and the further fact that the distinguished jurist in writing the opinion, declines to say 'yea' or 'nay' on other questions raised by brief

of counsel, is a cogent reason why that case should not now be construed as any authority in support of the validity of section 11767. The same is true of the case of *State ex rel. v. Everett*, 245 Mo. 706. The court regards it as a duty to follow what the Supreme Court does say in its decisions rather than what it may say by plausible inference. Section 46 of the Constitution construed in the *Kirkwood* case, 142 Mo., *supra*, is reasonably clear and the construction placed upon section 46 in that case is logical and this court is of the opinion that the Legislature has no power to pass a statute authorizing the township to pay the part of the road taxes collected in the cities and towns into the treasury of such cities and towns. The court is satisfied, under the law, the road taxes collected by the township collector and paid into the city treasury belong to the township.

“III. The taxes collected and paid into the city treasury by the township collector and *ex-officio* collector were so paid because these officers understood and believed it was their duty, under the law, as was generally understood by the officers of  
**Mistake of Law.** both plaintiff and defendant, so that if the court is right as to its construction of the law, these payments were made under a mistake of law. The payments having been so made, can the plaintiff recover the money by action at law? The authorities are not uniform on this question, and in the judgment of the court it is the most doubtful question involved in the case. As between individuals, payments under a mistake of law cannot be recovered. The court has examined the authorities cited in briefs of counsel, and has reached the conclusion that, in Missouri and in the best reasoned cases elsewhere, municipalities constitute an exception to the general rule. The case of *Morrow v. Surber*, 97 Mo. l. c. 161, clearly recognizes the exception to the general rule and is much



in point. The case of Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264, cited by defendant's counsel, supports the contention that payments under mistake of law cannot be recovered back. The facts in this case, without the application of this rule, clearly warrants the decision on the recognized rule that a municipality cannot accept the benefits of a void contract and retain them and recover back the consideration paid. This principle was recognized in the case of Aurora Water Co. v. Aurora, 129 Mo. l. c. 574, in a very able opinion by Judge SHERWOOD. In other words, municipalities will not be permitted to ignore every principle of common honesty, even though their officers do exceed their authority under the law in dealing with the public. In the Schell City case the officers of the city bought machinery from the defendant and paid part of the purchase price. The contract of purchase was held void, being unauthorized by law. Thereupon the city while retaining the fruits of the contract, brought suit to recover back the money paid on the contract, and the Court of Appeals denied the right to recover back the money paid on the contract and based their opinion on the general rule that money paid under a mistake of law cannot be recovered back. But reading that case in connection with Sparks v. Jasper County, 213 Mo. 237, it will be seen that the case is only treated as authority for the proposition that municipal corporations cannot retain property bought on a valid contract and recover back the consideration paid for it. The language of the court in Ada County v. Gess, 4 Idaho, 611, appeals to this court as a correct statement of the law. That court, among other things, says: Some authorities go so far as to hold that payments of public moneys under mistake of law cannot be recovered back. The doctrine is so repugnant to every principle of justice and common honesty that the latter cases do not, by their reasoning, commend themselves to this court. We cannot

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consent to carry the doctrine beyond settlements between individuals.

“A settlement made by an individual and a corporation binds the individual and these cases have caused some misunderstanding as to the law. The court holds that the public money of municipal corporations paid out by its officers under a mistake of law can be recovered back at the suit of such corporation.

“It is contended by defendant’s counsel that if the construction our court puts upon the constitutional provisions, and statute passed, using the same language, be correct, then both are void, being in violation of the Federal Constitution requiring equal taxation. That is to say, the taxing of the citizens of Lamar, a separate municipality, for the benefit of Lamar township, would be to require the citizens of Lamar to bear this burden without securing any benefit. The court thinks that counsel overlooks the fact that every citizen of Lamar is a citizen of Lamar township and has the right to participate in the administration of the affairs of the township. The improvement of the public highways are as important to the citizens of Lamar as the citizens living outside of Lamar in the township, but it is not true that the citizens of Lamar township are citizens of Lamar, or have anything to do with or control over, the administration of the affairs of the city. The property-owners who choose to live in a city or town, must bear the burden of taxation for the support of the city government, as well as State, county and township government. This may not seem fair, but it is the law.

“It follows from what has been said that the judgment must be for the plaintiff, on the first count for \$714.31, together with interest thereon from August 5, 1912, to this date, at the rate of six per cent per annum, amounting to \$46.79, an aggregate of \$761.10; on the second count for \$1455.30, together with in-

terest thereon from August 5, 1912, to this date, at the rate of six per cent per annum, amounting to \$95.32, an aggregate of \$1550.62; on the third count for \$1389.81, together with interest thereon from August 5, 1912, to this date, at the rate of six per cent per annum, amounting to \$91.03, an aggregate of \$1480.84; aggregating in all the sum of \$3792.56, and it is so ordered."

As stated by the learned judge *nisi* there is no particular difficulty in reaching the conclusion that the city of Lamar, as against the township of Lamar, is not, and was not, entitled to any of the road and bridge fund collected in Lamar township, pursuant to the levy made therein for the years mentioned. The case of *Green City v. Martin*, *supra*, settles this point beyond cavil.

The serious question and the one as to which appellant most earnestly and strenuously contends, is whether the rule that money paid without protest or duress, under a mistake of law, cannot be recovered, applies as between officers of municipal corporations dealing with the money and the property of the public. That individuals may not recover money so paid, absent fraud, protest or duress, is too well settled for argument. [*Needles v. Burk*, 81 Mo. 569; *Savings Institution v. Enslin*, 46 Mo. 200; *Campbell v. Clark*, 44 Mo. App. 249.] Likewise in other jurisdictions this rule so far as it applies to individuals, *sui juris*, dealing with their own property, is well nigh without exception. [30 Cyc. 1313, and cases cited.] The reason for the rule as between individuals (which while sometimes provocative of great miscarriages of justice, and while largely predicated upon expediency) is yet bottomed upon some considerations which are logical and well settled. Among these (but when wrong is being done, clearly not chief among these), is the maxim *ignorantia legis neminem excusat*. Likewise the rule touches nearly upon the doctrines of

accord and satisfaction, and of estoppel; as also upon the rule forbidding the unsettling of things settled and thereby disturbing repose by clamorous litigation. Other maxims, e. g. *volenti non fit injuria*, have likewise been invoked; but confessedly even among individuals, unless the peculiar facts of the case also warrants the application of the rule *ex aequo et bono*, there is little logic and less of honesty in putting it upon such an excuse. The best that may be said of the rule even as applied to individuals, is that it is a handy rule to apply in those rare cases where the application of it prevents gross injustice. [See, *arguendo*, Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264.]

Certainly in a case like this of dealings between public officers with the public's money, no excuse for invoking this rule can be found in logic, nor in our opinion can such excuse be found in the decided cases. The rule in such case is thus stated in 30 Cyc. 1315: "Although there are cases holding the contrary, the better rule seems to be that payments by a public officer by mistake of law, *especially when made to another officer*, may be recovered back." [Ada County v. Gess, 4 Idaho, 611; Heath v. Albrook, 123 Iowa, 559; Ellis v. State Auditors, 107 Mich. 528; Allegheny Co. v. Grier, 179 Pa. St. 639; State v. Young, 134 Iowa, 505; McElrath v. United States, 12 Ct. Cl. 201.]

In the case of Ada County v. Gess, *supra*, in a very able discussion of this identical question, the court said:

"As the county is a municipal corporation, it may sue and be sued, and we know of no limitation as to time, except that provided in the general limitation laws of the State. We are told, however, that money paid through a mistake of law is a voluntary payment, and cannot be recovered back; and we are cited to the case of Badeau v. United States, 130 U. S.

439, as sustaining that doctrine, but it does not do so. Chief Justice FULLER, in that case, did not place his decision on the ground that money paid by one officer of the government to another officer is a voluntary payment that cannot be recovered back, but upon the ground that the claimant, although retired, was still an officer of the army *de facto*, if not *de jure*, and for that reason he was entitled to the money received, and it could not be recovered back, and *ex aequo et bono* should not be returned. Some of the authorities cited, however, seems to sustain the contention of the appellant, and some authorities go so far as to hold that payments of the money of the public by its authorized agent to an officer on account of a mistake of law cannot be recovered back. The doctrine is so repugnant to every principle of justice and common honesty that the latter cases do not, by their reasoning, commend themselves to this court. We cannot consent to carry the doctrine beyond settlements between private individuals." [Ada County v. Gess, 4 Idaho, 611.]

In the case of Allegheny Co. v. Grier, *supra*, the court said:

"So, on the grounds of public policy, the court was right in holding that the maxim '*Volenti non fit injuria*' has no application to the illegal payment of public funds to a public officer—more especially where, as here, it is the peculiar function of that officer to guard the public treasury. Public revenues are but trust funds, and officers but trustees for its administration for the people. It is no answer to a suit brought by a trustee to recover private trust funds that he had been a party to the *devastavit*. There could be no retention by color of right. [Abbott v. Reeves, 49 Pa. St. 494.] With much the stronger reason is this doctrine applicable where the interests of the whole people are involved, and the authorities are accordingly numerous to this effect. [New Orleans v. Finnerty, 27 La. Ann. 681; Allen v. Com.,

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83 Va. 94; Com. v. Field, 84 Va. 26; Day Co. v. State, 68 Tex. 526; Steamship Co. v. Young, 89 Pa. St. 191; Taylor v. Board of Health, 31 Pa. St. 73; Smith v. Com., 41 Pa. St. 335, and cases cited.]” [Allegheny Co. v. Grier, 179 Pa. St. 639.]

Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his *cestui que trust* ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority.

Neither, so far as counsel have invited our attention or we have been able to find, is this view in conflict with anything which has been ruled by us in this State. The case of Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264, applies a different rule. But there were among the facts there held in judgment a peculiar condition of estoppel existing, which fairly distinguishes that case from this. Besides, that was not a case where one officer of a municipality was dealing with another officer of another municipality; there a municipality was dealing with a private business corporation. Concededly, however, the broad rule laid

down largely by *dictum* in that case is not in harmony with the views we are now here holding. In *Campbell v. Clark*, 44 Mo. App. 249, the rule here urged was approved.

The case of *Morrow v. Surber*, 97 Mo. 155, is in accord with what we here hold, though the court there went beyond the precise point up for ruling, in order to say that upon the facts there a private individual even would have been entitled to recover. Upon the two points touching the rule as it affects a public officer, and as it affects a private person, the court said in that case:

“Such a mistake as is here described furnishes ground for recovery of the money in this action. The plaintiff is the custodian of the county funds and sues here in his official capacity. He is agent of the county for the purposes defined by law, and the public is bound to take notice of the limitations of his agency. He cannot give away county funds or disburse them contrary to law. Any such disbursement is entirely invalid. If this case were between private citizens, the undisputed facts would support the judgment given by the circuit court under the settled law of this State. [*Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Koontz v. Bank*, 51 Mo. 275.]”

The other cases of *Scott Co. v. Leftwich*, 145 Mo. l. c. 34; *State ex rel. v. Shipman*, 125 Mo. 436; *State ex rel. v. Ewing*, 116 Mo. 129; and *State ex rel. v. Hawkins*, 169 Mo. 615, were all cases of settlements made by the county with county officers, i. e., circuit clerks and county collectors. Formal settlements intervened, which settlements were set down upon the solemn records of a court of record. The shadowy reason behind the holdings in these cases smacked of the doctrine of *res adjudicata*, and accord and satisfaction. In fact, this is the chief ground upon which the ruling is made in the latest case cited, to-wit, *State ex rel. v. Hawkins*, wherein at page 618 it is said:

"It also appears that the defendant Hawkins and the county court, at the March term, 1898, had a full settlement of his accounts of the revenue collected by him in 1897, and with full knowledge of his claim for \$216 commissions on back taxes collected by him that year, the court allowed him that credit. There is no charge of fraud or collusion in the case.

"Whether the court erred in allowing that commission on back taxes for that year, the settlement is binding and conclusive in the absence of fraud, collusion or mistake. [State ex rel. v. Ewing, 116 Mo. 129; State ex rel. v. Shipman, 125 Mo. 436.] The item of \$216 is no longer in the case." [State ex rel. v. Hawkins, 169 Mo. l. c. 618.]

Moreover, these cases may all be distinguished from the case at bar. Here there was no settlement whatever. The township collector and the county treasurer erroneously believing that under the law it was their duty to pay this money over to the treasurer of the city of Lamar, proceeded to do so. If this township collector had been of the belief that under the statute it was his duty to pay this identical money over to the clerk of this court and had at once done so, would it not be fairly plain that some sort of action would be maintainable to recover the money from our clerk? Such a rule as is contended for by the appellant might and could become a mighty instrument of evil and might (since there is no gauge by which to measure the kind and nature of the mistake of law which will serve to excuse) be used to defend against all manner of thefts and larceny and the illegal frittering away of the public money. While the question presented is a new one and a nice one so far as the precise facts here held in judgment are concerned, we yet think the learned trial court correctly resolved it. It results that the judgment should be affirmed. Let this be done.

*Walker, P. J., and Brown, J., concur.*



JOE N. ROBY et al., Appellants, v. JACK SMITH  
et al.

Division Two, July 14, 1914.

1. **DEED OF TRUST: Sale: Redemption: Laches: One Year and Eleven Months.** Where the cotenant in possession offered to pay off the note secured by a deed of trust on the property, and the legal holder (the defendant) refused to indorse the note to him unless it was to be marked paid, and for that reason the tender was not continued, and about four weeks after the sale to said mortgagee that cotenant surrendered peaceable possession to him, and he proceeded to construct buildings thereon worth three times the value of the property at the time of the sale, and the said mortgagors delayed for one year and eleven months after the sale was made before bringing suit to set the sale aside, and gave him no notice that they claimed the sale was unfair and though aware of the improvements being erected made no objection thereto and asserted no claim to the property, their delay in instituting their suit bars their right to recover.
2. ———: ———: ———: **Inadequacy of Price.** Inadequacy of price is not alone a sufficient ground for setting aside a sale under a deed of trust; and though the property sold for one-fourth its value, and though one of the mortgagors offered to pay the mortgage note before the sale, but the tender was refused because he was not willing to have the note marked paid but wished to have it indorsed to him, yet if the preponderance of the evidence is to the effect that the sale was fairly conducted, and after it was made the property was peaceably surrendered to the mortgagee as purchaser, and he proceeded to make valuable improvements thereon, and the mortgagors, though aware of such facts, made no claim to said property or objections to said improvements, the sale will not be set aside at their suit instituted one year and eleven months after said sale.

Appeal from Greene Circuit Court.—*Hon. Guy D.  
Kirby, Judge.*

**AFFIRMED.**

*Oscar B. Elam* for appellants.

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(1) By notifying Joe Roby that he would not accept payment of the note unless Roby would first agree to let the note be marked paid, Smith waived the necessity of and actual tender of the money due on the note. 38 Cyc. 134, 144; *Stephens v. Kilpatrick*, 166 Mo. 262; *Westlake v. St. Louis*, 77 Mo. 47; *Johnson v. Garlich*s, 63 Mo. App. 578; *Walsh v. St. Louis Exposition Assn.*, 101 Mo. 534. (2) After notifying Joe Roby that he would not accept payment of the note unless Roby would first make an agreement with him, Jack Smith had no right to cause the deed of trust on the land to be foreclosed in the absence of an unsuccessful demand upon the heirs or legal representatives of Almeda Weaver for payment of the note, Almeda Weaver being dead. 27 Cyc. 1386. (3) As the heirs-at-law of Almeda Weaver, the Robys had the right to discharge the lien of the deed of trust by payment of the debt secured thereby. 27 Cyc. 1386; *Sharp v. Garesche*, 90 Mo. App. 233. A tender may be made by anyone having an interest in the consequences of the tender. *Kincaid v. School District*, 11 Me. 189; 7 *Wait's Actions and Defenses*, 578; *Gould v. Armagost*, 46 Neb. 897; *Kartright v. Cady*, 21 N. Y. 343; *McDougald v. Dougherty*, 11 Ga. 588. (4) Defendants are not entitled to any consideration on the grounds of being innocent purchasers. They neither plead nor attempt to prove such a defense. *Holdsworth v. Shannon*, 113 Mo. 524. (5) Where the price bid is clearly inadequate, but not grossly so, where there are other circumstances rendering it inequitable to let the sale stand, the courts have set the sale aside. *Hardware Co. v. Brownlee*, 186 Mo. 621; *Vail v. Jacobs*, 62 Mo. 130; *Judge v. Booge*, 47 Mo. 544; *Stoffel v. Schoeder*, 62 Mo. 147. (6) Wherever the least fraud or unfairness appears, the court will always unhesitatingly give relief. *Clarkson v. Creely*, 40 Mo. 114; *Barnard v. Duncan*, 38 Mo. 170; *Powers v. Kneehoff*, 21 Mo. 430; *Rutherford v.*

Williams, 42 Mo. 19; McNew v. Booth, 42 Mo. 192; Grumley v. Webb, 44 Mo. 444; Goode v. Comfort, 39 Mo. 327, 328; Thornton v. Irwin, 43 Mo. 153; Dover v. Kennerly, 38 Mo. 469; Mangold v. Bacon, 229 Mo. 493, dissenting opinion.

*McNatt & McNatt* for respondents.

(1) The evidence of all the witnesses testifying on the point shows that defendant Smith purchased the note from payee Froley and that the same was properly indorsed. But if the indorsement was never put on the note the defendant Smith was the legal holder of said note. Sec. 10019, R. S. 1909. (2) Plaintiff alleged, and must prove, an unconditional tender, and even such tender does not defeat the lien of the deed of trust. Knollenberg v. Nixon, 171 Mo. 445. (3) The court having found that the preponderance of the evidence showed no unfairness in the sale of the land, inadequacy of price alone is not sufficient to set the sale aside. Keith v. Browning, 139 Mo. 190; Harlin v. Nathan, 126 Mo. 97. (4) The plaintiffs, by their laches, waiting until the rights of innocent purchasers intervene, are not entitled to set aside the sale. Ready v. Smith, 170 Mo. 174; Baker v. Cunningham, 162 Mo. 144; Kline v. Vogle, 90 Mo. 247.

BROWN, J.—Action to redeem real estate from sale under a deed of trust. From a judgment for defendants, the plaintiffs prosecute their appeal to this court. This suit was instituted in the circuit court of Lawrence county and transferred, by change of venue, to the circuit court of Greene county.

Almeda Weaver of Aurora, Missouri, owned a home in said city, upon which she placed a deed of trust for \$100 on September 26, 1907, to secure a loan of that amount from C. W. Froley. M. T. Davis was made trustee in this deed of trust.

Mrs. Weaver died October 20, 1907, leaving five children, all adults, surviving her. The names and residences of her respective children were as follows: James H. Roby, Oklahoma; Emma Kice, Kansas City, Missouri; S. M. Roby and A. A. Roby, Joplin, Missouri; and Joe N. Roby, who resided with her upon the encumbered property. Mr. Froleys sold the \$100 note secured by the deed of trust to Jack Smith, principal defendant in this action. On November 2, 1908, defendant Smith caused the deed of trust to be foreclosed and purchased the property at the trustee's sale for \$125. The object of this action is to set aside the trustee's sale and the deed made thereunder.

The plaintiffs and A. A. Roby are the legal heirs of Almeda Weaver, deceased. Said A. A. Roby having refused to become a plaintiff, was named as one of the defendants.

The plaintiffs aver in their petition that before the property in controversy was advertised for sale by the trustee (Davis), the plaintiffs tendered to the defendant Smith all the indebtedness secured by the deed of trust, and said defendant refused to accept such tender. That at the sale the trustee accepted defendant's bid of \$125 and refused to accept or cry a higher bid made by a solvent party. That the property was worth at the time of the sale \$1250 and would rent for \$10 per month; that the rental of said property during the time it has been in the defendant's possession is more than sufficient to extinguish the debt for which it was sold. Wherefore, plaintiffs demanded to be permitted to redeem the property, and if a balance was found due defendant Smith after charging him with rents as aforesaid the plaintiffs be adjudged to pay the same. Plaintiffs further prayed "that such orders and judgments and decrees be made in the premises as will adequately protect the rights of all parties in interest, whether specifically asked for here-

in or not, to the end that the very rights of all the parties may be protected."

The answer of defendant Smith avers that he bought the property in good faith, and that, after his purchase thereof in November, 1908, he made many improvements upon the dwelling house and erected a business house thereon, expending altogether about \$2500 in making permanent improvements before he received any knowledge or notice that plaintiffs set up any claim to said premises. Wherefore, he asserted that plaintiffs were, by their delay and laches, estopped from contesting the validity of said trustee's sale or asserting title to said property.

The only plaintiff who testified in the case was S. M. Roby, who stated that three of the heirs of his mother offered to pay off the \$100 lien placed upon the land in controversy; that he gave his brother Joe N. Roby a check for \$38 to cover his part of the expense of paying said debt. No other details of the alleged tender were given by this witness.

The only other evidence of an offer to redeem comes through the cross-examination of defendant Smith, who testifies as follows:

"Q. Tell the court if anybody at any time offered to pay this note. A. After I got the note, after Mr. Froley sold me the note, I don't remember how long it was afterwards, Roby met me one day, and says, 'I have got the money to pay that note off,' and I says, 'If you will meet me at the People's Bank in about twenty minutes you can pay it off,' and I waited there a few minutes, and he came in and said, 'If I pay that note off, you make it just like you got it from Froley.' I says, 'If you pay it off, I will let the cashier mark it paid,' and I says, 'If you have got the money to pay that note off, you could pay for the groceries you have bought. . . .'

"He said he had the money to pay it off; he said that he would meet me at the bank in fifteen minutes,

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and he said he wanted it signed over just like he wanted it, and I told him if he had the money to pay off this note, he could pay for the groceries that he got several years ago; if he paid it off I wanted the cashier to mark it paid.

"Q. That's the only thing that kept you from settling this matter? A. After it was marked paid by the cashier I said I would turn it over to him; he said he wouldn't do it, and he turned and walked out of the bank.

"Q. You refused to accept the money until the cashier marked it paid, did you? that is the only reason that Joe Roby didn't pay that note that day down there at the bank, is because you wouldn't take the money until the cashier marked the note paid? A. I didn't see any money; I told him if he would let the note be marked paid I would turn it over to him.

"Q. Down there at the bank about a month before the sale under the deed of trust, before the note was due, you met Joe Roby? A. I couldn't tell you; I might have met him every day.

"Q. You met him there at the bank for the purpose of making a settlement of this note? A. Yes, sir; met him there for the purpose of paying it off.

"Q. Now, after the note was due, you told Joe Roby you would meet him at the bank, where he could pay that note off? A. Yes, sir.

"Q. After you got down there, you told Joe you wouldn't take the money unless he would first let the cashier mark the note paid? A. That's what I told him.

"Q. He told you he wanted you to endorse it just as you had gotten it, and you refused to do it? A. Yes, sir."

Said plaintiff S. M. Roby stated that he knew his brother Joe N. Roby was living in the property when the deed of trust was foreclosed. Heard of the sale about two weeks after it took place; heard that de-

defendant Smith moved into the house three or four weeks after the sale. Said witness further stated that his brother returned the check for \$38 about two weeks after it was given. He refused to become a party plaintiff when the suit was first instituted, but did subsequently become a plaintiff in the case.

Defendant Smith further testified that he never heard of any defect in the trustee's sale, nor of any intention on the part of plaintiffs to set up a claim to the property until after he made the improvements hereinbefore mentioned. Said witness also stated that plaintiff Joe N. Roby peacefully turned over to him the keys and possession of the property a few days after the trustee's sale. The evidence tended to show that the property was out of repair when sold by the trustee and worth between five hundred and a thousand dollars.

Evidence concerning the alleged misconduct of the trustee at the sale, and such other facts as are necessary to an understanding of the case, will be noted in connection with our conclusions.

### OPINION.

I. The evidence in regard to the alleged tender of the amount of the debt for which the trustee sold the property establishes the fact that the  
**Tender.** plaintiff Joe N. Roby offered to purchase from defendant Smith the note representing the encumbrance on the land. That Smith without declining the amount due him did decline to sell the note or deliver it until it was paid. Whether these facts amounted to a tender we need not decide, because the case breaks upon another issue to be noted in paragraph three of this opinion.

II. Concerning the alleged fact that the trustee refused to cry or consider a bid made at the sale by

C. W. Frole, a solvent party, it was shown that only two bids were made at such sale; the first one was

**Bid.** \$100, and the second \$125. Witness Frole

testified that he attended the sale, intending to buy the property if it did not sell for over \$800. That he stood ten feet away from the trustee and bid \$200, but the trustee paid no attention to his bid and declared the property sold for \$125. Witness Frole does not say that he interposed any objection to the action of the trustee in refusing to consider his bid while the sale was progressing, but states that after the sale was over, and the bidders had dispersed, he went to the bank where Mr. Davis was at work and told him that the sale was unfair. One other witness corroborated Mr. Frole in regard to his alleged bid of \$200. Two witnesses testified that Mr. Frole was not present at the time the sale was advertised to take place and the trustee telephoned for him to come to the sale, which he did, but made no bid. Mr. Davis, the trustee, testified, denying that Frole made a bid or made the statement to him about the sale being unfair. Five other witnesses who attended the sale, one of whom was acting as attorney for the Roby heirs, stated that no bid was made by Mr. Frole. On the foregoing evidence we hold that the charge that the trustee refused to consider all the bids made at the sale was not proven by a preponderance of the evidence.

III. We come now to the alleged laches of plaintiffs in delaying the institution of their suit, and in failing to promptly assert title to the property. The

**Laches.** trustee's sale took place November 8, 1908,

and this action was instituted on October 17, 1910, one year and eleven months after the sale. The defendant Smith testified that he spent almost \$2500 on the property in the form of permanent improvements before he was notified of the plaintiffs'



claim. The making of the improvements was also proven by other testimony. There was no evidence of any hidden defects in the sale, nor of any secret fraud on the part of defendant Smith. All of his acts were open and known to plaintiffs.

S. M. Roby, the only plaintiff who testified, knew of the sale, and that defendant had entered into possession within four weeks after the sale occurred, yet he does not claim to have notified defendant that he was dissatisfied with the sale. In fact he declined to become a party plaintiff until other heirs had instituted the suit. Joe N. Roby who was in possession of the property, presumably as the agent of his co-plaintiffs, gave up his possession without a protest. This act would naturally lead defendant to believe that the validity of the sale would not be contested.

In his answer, as well as in his testimony, defendant Smith states that, during the time he was making improvements on the property, plaintiffs did not assert any claim thereto. With this answer on file plaintiffs did not offer one word of evidence tending to prove that while defendant Smith was making the improvements (which at least trebled the value of the property in controversy) they gave him any kind of notice of their claim; neither have they proven that they were unaware of the fact that such improvements were being made. Upon this showing was the circuit court's judgment for defendants erroneous? The right to maintain a suit in equity is not always governed by the Statutes of Limitation. The right of a party seeking to set aside a sale which is not void, but merely voidable, is often barred by a lapse of time far less than the period prescribed by the statute. This for the reason that equity favors the diligent and will turn a cold face upon those who sleep upon their rights for an unreasonable period, during which time the party in possession is making permanent improvements. [Landrum v. Union Bank, 63 Mo. 48; Bucher

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v. Hohl, 199 Mo. 320, l. c. 330; Rutter v. Carothers, 223 Mo. 631, l. c. 640; Ready v. Smith, 170 Mo. 163; Baker v. Cunningham, 162 Mo. 134.]

In the case of Ready v. Smith, 170 Mo. 163, a recovery was denied in a suit to set aside a trustee's sale where the action was delayed only a year and ten months, during which time the property had been sold to a third party. It is true that the facts in Ready v. Smith, *supra*, are not the same as in the case at bar, but the facts in equity cases are nearly always different in some particular. However, when all the facts in the present case are considered, the delay of the plaintiffs for a year and eleven months to institute their suit, or otherwise assert title, during which time the expenditures made in good faith by defendant Smith more than trebled the value of the property in dispute, fully warrant the judgment for defendants.

IV. Plaintiffs also assert in their brief that defendant Smith instituted a suit for the purpose of clouding the title and deterring bidders at the trustee's sale. But this contention is outside the pleadings and not sustained by the evidence. We will not encumber the opinion with a further discussion of it.

Suit to Cloud  
Title.

V. It is to be regretted that the property in controversy brought at most not more than one-fourth of its value at the trustee's sale, but such things frequently happen, and will continue to happen as long as people encumber property for debts which they do not or cannot pay. By the great preponderance of evidence before us we find that the sale was conducted fairly and that the judgment should be affirmed. It is so ordered.

Consideration.

*Walker, P. J., and Faris, J., concur.*

SYLVIA F. FENTON et al. v. CHAS. F. FENTON  
et al., Appellants.

Division Two, July 14, 1914.

**DEED: Delivery: To Third Person for Record: Voluntary Family Settlement.** A mother, by way of voluntary family settlement, made separate deeds to her two children and to her grandchildren, covering in the aggregate all of her real estate. She delivered the three deeds to her son Fred with instructions to record them. He recorded his own, and that of his brother was afterward recorded, but that to the grandchildren he returned to the grantor, in whose trunk it was found at her death ten years later. *Held*, a good delivery of the deed to the grandchildren, and, this being a case of family settlement, and the grandchildren having been minors at the time of the delivery, their acceptance is presumed, and the title passed to them.

Appeal from Bates Circuit Court.—*Hon. C. A. Calvird*, Judge.

**AFFIRMED.**

*Smith & Chastain* for appellants.

The evidence in this case does not show that the deed to the plaintiffs was ever delivered. The attorney who presented it and before whom it was acknowledged, who was introduced by the plaintiff, testified that after the acknowledgment he returned it to the grantor. The evidence is undisputed that she delivered the three deeds in question to her son, Fred, to be kept for her in his safe, until she called for them. The plaintiffs' own evidence shows that she afterwards did take this deed out of the possession of her son, Fred, and that it remained in her possession and under her exclusive control until the time of her death. These facts, even if it be conceded that she made some statements during her lifetime indicating that she

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thought the deed had become effectual, do not show a delivery, especially in view of the advice which her attorney, Smith, gave her at the time the deeds were written, to the effect that if the deeds were destroyed at any time prior to her death without having been recorded no estate would pass. *Mudd v. Dillon*, 166 Mo. 119; *McNear v. Williamson*, 166 Mo. 358; *Bunn v. Stewart*, 183 Mo. 375; *Rausch v. Michel*, 192 Mo. 293; *Chambers v. Chambers*, 227 Mo. 282; *Huey v. Huey*, 65 Mo. 689; *Griffin v. McIntosh*, 176 Mo. 392; *Terry v. Glover*, 235 Mo. 550.

*W. O. Jackson and Silvers & Dawson* for respondents.

The law presumes much more in favor of the delivery of deed in the case of voluntary settlements, especially when made to infants, than it does in ordinary cases of bargain and sale. *Crowder v. Searcy*, 103 Mo. 118; *Bryan v. Wash*, 2 Gilm. 568. The rule in this State has been settled by the decision that when a deed to a minor from his father is absolute in form and for his benefit and the grantor voluntarily hands the same to the third person telling him to have it recorded, it amounts to a delivery. *Crowder v. Searcy*, 103 Mo. 118; *Togan v. Bass*, 85 Mo. 654; *Seibel v. Hingham*, 216 Mo. 131. Delivery has been held good, though the grantor retained possession of the document, manual delivery not being necessary. *Sneathen v. Sneathen*, 104 Mo. 210; *Newton v. Bealer*, 41 Iowa, 334; *Shanklin v. McCracken*, 151 Mo. 587. In this case, the execution of the three deeds was one transaction, as in *Crowder v. Searcy*, 103 Mo. 119.

ROY, C.—This is a controversy over seventy-two acres of land. The petition is in three counts. The first count alleges that Mary J. Fenton on October 31, 1901, conveyed to the defendant George W. Fenton,

seventy-nine acres of land, to defendant Charles F. (Fred) Fenton, seventy-eight and a half acres, and to the plaintiffs seventy-two acres, all particularly described in the petition, she being the owner at the time of the conveyances and reserving a life estate in said land by the terms of said deeds. The petition alleges that the four plaintiffs were all minors at the date of said deeds; that the deed so made to plaintiffs was delivered to the defendants for the use and benefit of plaintiffs and was, at the institution of the suit, in the possession and control of the defendants, and had never been recorded. That said George W. and Charles F. Fenton and these plaintiffs are the sole heirs of said Mary J. Fenton, who died in January, 1911. That plaintiffs are the owners in fee of the seventy-two acre tract. The petition then prays that the defendants be directed to deliver to the plaintiffs the deed so made to them, and that defendants be divested of all apparent title to said land and that the same be vested in plaintiffs. Then follows a prayer that said land be partitioned and sold and the proceeds be distributed among the plaintiffs.

The second count is for partition of the same land and seeks to charge the defendants Charles F. and George W. Fenton with advancements equal to their share of the land in controversy.

The third count is for the purpose of quieting the title against the heirs and legal representatives of a former owner of the land. These defendants made default and judgment went against them.

At the date of the deeds the grantor, Mary F. Fenton, was an aged widow, with two sons, the defendants George W. and Charles F. (Fred) Fenton. These four plaintiffs are the children of her deceased son, Philip C. Fenton. She was living in the house on the tract in controversy. That tract was to some extent less valuable than each of the other two tracts mentioned. She went before Mr. Smith, as her lawyer,

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and had the three deeds prepared. She signed and acknowledged them and took them home with her. Shortly afterward she handed them to her son Fred. Concerning that transaction Fred testified as follows:

"I recall the circumstance of mother turning over to me a deed to the seventy-two acres in question; I think this was in 1902 and was at her home. I was at her house on a visit. She asked me to come and go in the bedroom with her. I went in there and she gave me these three papers. She says, 'You have a safe at the store, haven't you?' I says, 'Yes, ma'am.' She says, 'You put them in your safe and keep them until I tell you what to do with them; keep them there for same keeping,' she says. I done exactly what mother told me to do—put them in my safe in my store, and they were never touched from the time she gave them to me until the time she called for them, which was something like a year after that. I asked her what the papers were when she gave them to me and she says, 'You can read them as you go home and see.' She afterwards called for these deeds at my house. I took them out of the safe and handed them together to her just as she gave them to me to keep for safe keeping. She handed me my deed back and says, 'Fred, here is your deed; you can do as you please with it,' and she told me to tell George to do as he pleased with his, that he could have his, and she gave back to me George's deed. She did not give back to me the deed to the land in controversy, but took it with her. I have never had possession of that deed from that day until this, and, furthermore, since the time of the conversation she made to me at the time she asked for the deeds back, she says, 'This deed I am going to change'—that was the deed for the seventy-two acres. She said, 'If you will be the administrator for these heirs I can fix it up some way at their death it will go back to the Fenton estate; I will do that; but otherwise they cannot have it.' I said 'Do just

as you please, ma, about it,' but I told her I wouldn't under any circumstances be their administrator. She says, 'Then they will not get it.' By George's instruction I sent George's deed to W. W. Graves for record. I sent it through the mail. I do not remember whether he sent it back to me or to George."

George W. Fenton testified as to the deed to plaintiffs, as follows:

"I went with my mother to Adrian at the time she signed and acknowledged the deed to the plaintiffs before A. J. Smith. She afterward told me she had given this deed to Fred to keep for her until she called for it. I do not know the exact date when it was returned to her, but I guess from what she told me it was something like a year and a half later. I afterwards saw this deed among some of her other papers in the drawer of her dresser in her house. It remained there in the house five or six years. She and I cleaned out the dresser drawer, as the mice had eaten up part of the papers there, and I, by her instruction, put it in a trunk that she bought from Pete Alexander. This deed remained there in the trunk during her life and until after her death. I never had the custody or possession of that deed. During her lifetime my mother, on different occasions, remarked that she thought the children didn't treat her right; that they didn't care nothing for her, only for what she had, and they wasn't going to get it."

The deed to Fred was recorded February 3, 1903, and the one to George on February 7, 1903.

At the time of the execution of these deeds and for three or four years afterward, James C. Fenton and his wife lived in the same house with the grantor. He was her step-son, and the half-brother of her children. Mrs. James C. Fenton testified that the grantor told her that she had given all the deeds to Fred to be recorded, but that he only had his own recorded, and that she didn't know it until George came; that

George saw in the paper that Fred's deed had been recorded, and came to his mother to see why Fred's deed only had been recorded, and that the grantor had told George that she thought Fred would have them all recorded, and that he could have his deed recorded. James C. Fenton testified as follows:

"Emily Fenton, Phil's widow, came to the house quite frequently, and so did the other brother, George, and it seems that ma had turned the deeds over to Fred to have them all recorded, that was the impression I got from their talk, and from the way the thing was done; Fred had his recorded and return the other two. After George discovered that his deed had not been recorded he came to see about it, and she went to Fred and got the deeds back and turned them over to George and George had his recorded and didn't have the third one recorded. So Emily then came to inquire in the interest of her children, came to grandma, and ma talked to my wife and me frequently about it, and to me especially. . . . Emily would come right down after ma once or twice a month, possibly, and she would say, 'I am feeling bad and Emma disturbs and worries me about that old paper, and I wish she didn't talk to me about it. I have fixed it to suit myself, and I am going to have those children, Phil's children, safe.' She says, 'I know Phil's children haven't their share and there won't be any trouble about it, and I assured Emma of that.' She refused to turn the deed over to Emma; I supposed she had it. She said, 'I will have it attended to; I will turn it over to you.' The deed was evidently in the house. George was there most of the time himself. I heard these conversations with Emma after George's and Fred's deeds had been recorded, and she assured her every way she could that she would have it done right and that she wasn't going to turn it over to her now. She said, 'I haven't got any too much confidence in the Powells. She is a young widow and might marry again and those



children be beat out of it.' She told me she had taken the children's deed away from Fred and she was going to have it attended to by someone else. These conversations were while I was living there, since which time I know nothing about the matter."

The deed to plaintiffs, after the grantor's death, was found in her trunk at her home. She left a will executed December 10, 1910, in which she gave the plaintiffs a dollar each, and gave all the residue of her personal property to the two sons. The will made no mention of real estate.

The grantor delivered all the deeds to Fred. He testified that they were to be kept by him for her.

He stands alone in that statement. The facts show the contrary. James C. Fenton and his wife, inmates of the

**Deed: Delivery:  
To Third Person  
for Record.**

mother's home, testified that she stated that the deeds were delivered to Fred for record. Fred did put his on record. Such fact was published in the papers. As a result George went to see his mother about it and his deed was sent to record. Later on the mother of the plaintiffs became importunate about the deed to them. The grantor had talks with Fred in which the subject was discussed as to changing the deed so that at the death of the plaintiffs the land would go back to the Fenton estate. We need not conclude that Fred was responsible for a change in the mind of the grantor, if there was a change. It is sufficient to say that a great preponderance of the evidence shows that the grantor delivered all these deeds to Fred to be by him placed on record. As late as 1910, she made her will which shows that she was unconscious of having any real estate to dispose of. Even if she did undergo a change of mind after delivering the deeds to Fred for record, and did get possession of the deed and refuse to deliver it to the mother of plaintiffs or to put it on record, that fact does not

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destroy the legal effect of the previous delivery to Fred for record.

In *Crowder v. Searcy*, 103 Mo. l. c. 118, it was held that the law presumes much more in the case of voluntary settlement, especially when made to infants, than it does in ordinary cases of bargain and sale. In that case the grantor signed and acknowledged a deed to his grandchildren and handed it to a third party to be recorded and gave him the money for that purpose. The court said: "When he did this, we hold that the first deed was fully delivered and the title passed to the defendants, even though there was a misdescription. A court of equity would have corrected the description. Equity regards that as done which ought to be done."

The fact that the grantor gave the third party the money to record the deed does not make any difference. When Mrs. Fenton handed the deeds to Fred to be recorded, if she did not furnish him with the money to pay for recording them, his acceptance of the duty was equivalent to an undertaking to have them recorded.

In *Standiford v. Standiford*, 97 Mo. l. c. 239, it was held that each case must stand on its own peculiar facts, the court saying: "It is sufficient, if, after the grantor has signed, sealed and acknowledged the deed, he makes some disposition of it from which it clearly appears that he intended that the instrument should take effect as a conveyance and pass the title."

This being a case of family settlement, and the grantees being minors at the time, their acceptance of the deed will be presumed.

In our opinion the judgment and decree entered on the first count disposes of the controversy in the second count, and the judgment is in all particulars affirmed. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of ROY, C., is adopted as the opinion of the court. All the judges concur.

THE STATE v. FLOYD TAYLOR, Appellant.

Division Two, July 14, 1914.

1. **VERDICT: Using Word Information Instead of Indictment.** Where the jury in their verdict say they find the defendant guilty "in manner and form as charged in the information," whereas he was tried under an indictment preferred by a grand jury, the mistake of using the word "information" instead of the word "indictment" is not error. The rights of the defendant are not prejudiced by such mistake.
2. **—: Two Defendants: Joint Verdict: Irregularly Worded.** Where two defendants are jointly indicted for the same murder and jointly tried, a verdict reading, "We, the jury, find the defendants guilty in manner and form as charged in the information and assess their punishment at life imprisonment," violates the express letter of the statute (Sec. 5252, R. S. 1909) which says that when several defendants are jointly tried their punishment shall be assessed separately and not jointly; and it is also imperfect and irregular in that it assesses the punishment at "life imprisonment." But such a verdict is tantamount to a general verdict of guilty, which fails to assess any punishment, since the punishment is erroneously assessed. In such case it is competent for the court himself to assess the punishment at ninety-nine years' imprisonment in the penitentiary, as he is authorized by statute to do (Sec. 5254, R. S. 1909), instead of at life imprisonment, as the jury evidently attempted to do. Under such circumstances, the verdict is not reversible error, although the court subsequently granted a new trial to appellant's coindictor, and thereafter he was discharged upon a *nolle prosequi*.
3. **MURDER: Statement of Coindictor: Failure to Instruct: Collateral Matter.** Where two defendants are jointly indicted and tried for the same murder, it is not error for the trial court to instruct the jury in behalf of appellant that any statement made by his coindictor is not binding upon appellant, (1) if there is no evidence of any statement having been made by said coindictor which tends to connect appellant with their

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joint case, or (2), even if there is such testimony, unless appellant requests such an instruction, since the matter is a collateral one and is not strictly within the purview of section 5231, Revised Statutes 1909.

4. ———: **Instruction: Wrong Date of Deceased's Death.** Where deceased was found dead on August 8, 1910, and defendants were tried in December, 1912, an instruction telling the jury that if they find and believe that "at any time prior to the filing of the indictment" defendants did strike and beat deceased with a heavy iron bar, "and that within a year and a day thereafter, to-wit, on the — day of August, 1912, he died from the effects of such striking and beating," they should find the defendants guilty, contains only a clerical mistake in stating the date of deceased's death as "on the — day of August, 1912," which is without substance, since the jury are expressly required to find that deceased died within a year and a day after he was assaulted, which cures the palpable clerical error of 1912, and besides, since it is a murder case, it is wholly unimportant when the prosecution was begun, if deceased died within a year and a day after he was assaulted.
5. ———: ———: **Defendant's Failure to Testify: Refusal of Instruction Not to Consider.** It is not reversible error to refuse an instruction asked by defendant to the effect that the jury are not to consider as any evidence of his guilt or innocence the failure of defendant to testify in his own behalf. [Following *State v. Robinson*, 117 Mo. 649.] Neither is it error for the trial court to give such an instruction. [Citing *State v. DeWitt*, 186 Mo. 61.] And it would perhaps be a little fairer to defendant to give such an instruction, if he asks it; but in view of the dark and muddy language of Sec. 5243, R. S. 1909, and the holding in the *Robinson* case, it cannot be held to be reversible error not to give it.
6. **NEW TRIAL: As to One Defendant: Not as to Other.** The granting of a new trial to one of two defendants, jointly indicted and jointly tried and jointly found guilty by the same general verdict, is not *ipso facto* a granting of a new trial to the other.
7. ———: **Sufficiency of Evidence: Where it Might Properly Have Been Granted.** Although the Supreme Court may be of the opinion that the trial court, in view of the evidence, should have granted to appellant a new trial, it will not on that ground hold that the trial court committed error if there is substantial evidence of defendant's guilt. The Supreme Court has nothing to do with the credibility of the evidence; its weight and credibility are for the jury, and if their verdict meets the approval of the trial judge the Supreme Court, although the strange fact that the State's main witness is

accused's own sister and the deceased was to her unknown may challenge attention, cannot compel a new trial on the theory that her testimony is contrary to human experience, her testimony being substantial and if true showing defendant's guilt, and bearing the earmarks of verity, and there being no showing of enmity or unfriendliness on her part for accused, and nothing in her manner of testifying or conduct from which either could be inferred.

Appeal from Franklin Circuit Court.—*Hon. R. A. Brewer*, Judge.

**AFFIRMED.**

*Frank A. Habig* and *David W. Breid* for appellant.

(1) It was error for the jury to return a joint verdict. *State v. Person*, 234 Mo. 262. (2) The court erred in not instructing the jury that the statements made by Taylor would not bind Hoffman, and the statements of Hoffman would not bind Taylor. R. S. 1909, sec. 5231; *State v. Bidstrup*, 237 Mo. 385: (3) The alleged verdict, as returned by the jury, is absolutely void and no verdict at all. (4) Since there was a joint indictment, a joint trial, and a joint motion for new trial, and since the defendants were charged as committing the crime jointly and together, the sustaining of the motion for new trial as to one sustains the motion as to both. *Hoborn v. Naughton*, 60 Mo. App. 100. (5) The indictment charges that the murder was committed August 8, 1910, and the instruction as given by the court on the part of the State instructs the jury "that if they believe and find from the evidence that the defendants at any time prior to the finding of the indictment herein . . . did strike and beat, . . . and that within a year and day thereafter, to-wit, on the — day of August, 1912, he died," etc. It was error for the court to instruct the jury to find that the killing took place on the — day of August, 1912. (6) It

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was error on the part of the court to refuse to give defendants' instruction to the effect "that the fact that the defendants did not testify in their behalf is not to be accepted by you as any evidence of the guilt or innocence of the defendants." (7) The verdict is against the evidence and the weight of the evidence, and the court erred in overruling defendant Taylor's motion for new trial.

*John T. Barker*, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

(1) Under Sec. 5252, R. S. 1909, when defendants are jointly tried the punishment of each in case of conviction must be assessed separately. The jury in the case at bar failed to assess separate punishments, but the cases hold that the verdict is a legal and valid verdict of guilty and the punishment not being assessed, under Sec. 5254, R. S. 1909, the court may fix the punishment. A new trial was granted the codefendant, Hoffman, and a separate sentence was given the appellant, Taylor, in accordance with the verdict returned. *State v. Gordon*, 153 Mo. 576; *State v. Thornhill*, 174 Mo. 364; *State v. Person*, 234 Mo. 262. (2) The fact that the word "information" was used instead of the word "indictment" is in no way prejudicial to the appellant. The verdict would have been proper in form had the word information been omitted and the defendants simply found guilty "as charged." In other words, the word "information" can be considered as surplusage. (3) It is contended that the court erred in refusing to instruct the jury to the effect that statements made by Hoffman would not bind Taylor. The record does not disclose that any such instruction was requested or suggested by the appellant, although some other instructions were requested. There is not even a general specification in the motion for new trial that the defendant failed

to instruct on all the law in the case. Under these circumstances the failure of the court to instruct as to the statements made by the appellant and Hoffman was not error. *State v. Conway*, 241 Mo. 291; *State v. Dockery*, 243 Mo. 599; *State v. Sykes*, 248 Mo. 713. (4) The particular date of the assault and death was unknown. *Pattison on Instructions in Criminal Cases*, sec. 610; *State v. Brassfield*, 81 Mo. 151; *Kelly's Crim. Law & Pr.* (3 Ed.), sec. 184; 1 *Hawkins*, ch. 23, sec. 90; *State v. Sides*, 64 Mo. 383. (5) A refusal to give an instruction to the effect that if the accused party failed to testify such failure shall not raise any presumption against him, was not error. *State v. Robinson*, 117 Mo. 663. It was later held that it was not error to give such an instruction. *State v. DeWitt*, 186 Mo. 61. This last case finally held that it was unnecessary to give the instruction, but it was not reversible error to do so, as it was not prejudicial to the defendant. Under this opinion the trial court might have favored this appellant by giving the instruction, but the refusal so to do was not error. (6) There are many strong facts in the case that point to the appellant's guilt, namely, positive identification of appellant as being with the deceased in Pacific, the testimony of his own sister concerning conversations had with the appellant which related to the crime, and the statements made to the police officers in St. Louis. The record does not show any passion and prejudice and the jury was better able to determine what the proper verdict should be, after hearing the evidence, and noting the demeanor of the witness on the stand, and discerning what was truthful and untruthful as it came from their mouths, than this court would be.

FARIS, J.—Defendant was convicted in the circuit court of Franklin county of murder in the second degree, for that, as it was charged in the indictment, he and one Jake Hoffman at the town of Pacific in

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said county on the 8th day of August, 1910, killed an unknown man. Both defendant and Hoffman being found guilty defendant herein was sentenced to imprisonment in the penitentiary for a term of ninety-nine years, from which sentence he has, after the usual motions, perfected this appeal. Hoffman was granted a new trial upon his motion to that end, therefore so far as the law of this case is concerned and except only as the facts in the testimony may make necessary references to him, he falls out of it.

The trial of defendant was concluded on the 20th day of December, 1912. On the next day thereafter he filed his motion for a new trial and his motion in arrest. The trial court continued these motions until January 10, 1913, at which time leave was given defendant to file affidavits in support of his allegation of newly discovered evidence, and the motions aforesaid were held by the court under advisement until the 13th day of March, 1913, at which time the court overruled them and this appeal followed.

The points which are urged upon us as error by defendant render necessary a statement of the facts as we glean them from the voluminous evidence in the case. The deceased, whose name was to the jury which preferred the indictment unknown and who continues yet to be unknown, came into the town of Pacific, in Franklin county, on a train from St. Louis on Sunday, August 7, 1910, at about two o'clock in the afternoon. He inquired of the railway agent at Pacific touching the time at which he could get a train either for Cuba or Rolla, Missouri, and was advised that he could get such train at about the hour of three o'clock and thirty minutes. He asked permission to leave and did leave his suit case with the agent. Thereafter the deceased was seen by a negro, William Yancey, who was a witness in the case, in company with two men, who are identified by said Yancey as the defendant Floyd Taylor and the said Jake Hoffman.



This witness Yancey saw the dead man, together with the defendant and Hoffman going into a saloon at Pacific. Yancey further says that defendant, Hoffman and the deceased went over to a hotel at Pacific and that he saw the deceased sitting on the porch of this hotel in a chair, and that defendant and said Hoffman walked down the track of the Frisco railroad and he heard either defendant or said Hoffman say they would get the grip and would thereafter be ready. Later this witness, Yancey, saw the taller one of the defendants Hoffman and Taylor with a brownish grip. The evidence does not disclose clearly which of the two, whether Hoffman or Taylor, was the taller, but by inference it appears that the defendant was the taller man to whom the witness referred.

The above in substance is the testimony of the negro William Yancey upon his examination in chief. It is but fair to say that upon his cross-examination his testimony becomes uncertain and obscure and upon many points so rambling as to create thick doubt as to its credibility, touching which we shall have more to say when we come to express our views upon the case.

The State offered two colored women who were employees of the Wunderlich Hotel, at which hotel deceased is said by some of the witnesses to have eaten his dinner and supper and at which he is also said to have engaged a room. Beyond the fact that one of these negro women, called in the record Pinkie Lewright, claims to have seen one of the defendants eating dinner at this hotel with the deceased, the testimony of neither of these witnesses throws any light upon the case or affords any aid in the solution of the mystery, save it may be that one of these women says that the bed in the room said to have been assigned to deceased bore no evidence of having been slept in.

The city marshal and constable at Pacific, one Ignatz Zieger, testified that on the night of August 7.

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1910, he saw three men go behind a box car in the railroad yards, at a distance of about a half a block from the place at which the body of the deceased was afterwards found. Neither of these defendants nor the deceased man was identified by the marshal as being either of the three men whom he saw in the vicinity of the place of the subsequent homicide.

On the following morning, August 8, 1910, at about eight or nine o'clock, the deceased was found dead in the westerly part of the railroad yards at Pacific in a small creek which runs through these yards. His body was lying in the mud and water of the creek, which was at this point only some two or three inches in depth. The body was partially concealed by some telephone poles or piling which were at this point laid across the creek and under which the body of deceased had been rolled or thrust, while resting upon his body was a wide and thick piece of timber, some five feet long, called by the witnesses a "stringer." There were wounds upon the face of the dead man and his skull was found to be crushed in at the back thereof, as though with a heavy three-cornered weapon. Large pools and spots of blood were found between the railroad track and a fence in the vicinity, together with marks upon the soft ground nearby as if a number of men had engaged there in a struggle. There was blood, not only upon the fence and ground, but upon a peach tree in the vicinity and blood from the shoes of persons who had made bloody footprints on the telegraph poles, apparently in crossing the creek. The pockets of the deceased were turned inside out and one of his shoes, the witness Zieger says his left one, had been taken off. Near the body and some five feet distant therefrom an iron rod, about three quarters of an inch in diameter and a foot long, was found, also near was a heavy wooden club. At the end of this rod there were two iron nuts, forming a weapon which, with the nuts, weighed some three pounds. On the end

of the rod and on the nuts thereon, and upon the wooden club, blood and hair resembling the hair of deceased, were found.

A witness for the State, one Rachel Caveness, a girl some thirteen years of age, testified that on Sunday afternoon preceding the finding next morning of the body of deceased, defendant and Jake Hoffman were together at the house where the witness Rachel Caveness was staying and borrowed from her sister a torch with which to light a cave into which defendant and Hoffman desired to go. She further testified that some little time thereafter defendant returned this torch to them. She identifies, in a fairly conclusive way, both the defendant and said Hoffman. Neither is her testimony at all seriously shaken by the rigid cross-examination to which she was subjected.

The defendant was arrested a little more than two years after the dead man was found. His arrest was effected at Duquoin, Illinois, by the deputy constable of Pacific, one Deatherage. Deatherage brought the defendant back to Franklin county, and on the way back held him for a time in jail at St. Louis. While in jail at St. Louis and in the presence of Assistant Chief of Detectives Schmidt and Officer Fleming and of the witness Deatherage he made a voluntary statement relative to the charge against him, to the substance of which all three of the above named witnesses thereto, who testified in the case, practically agreed. He said, according to these three witnesses, that he and Hoffman had fallen in with the dead man in the mid-way of the Union Station at St. Louis on August 7, 1910; that they all went together to Pacific. That after reaching Pacific they went into a saloon and got some drinks and then went to the house of a man by the name of Bridges, whence they procured a bucket of beer, but that at seven o'clock in the evening of August 7, defendant, as he says in his said statement, caught a train to Washington, Missouri, and left Hoff-

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man and deceased on the station platform at Pacific. Defendant further stated that he remained in Washington a couple of days and then returned to St. Louis, and that in St. Louis shortly after his return, he met Hoffman on Market street, near Twentieth, and was asked by Hoffman whether he (defendant) had heard about that fellow being killed at Pacific. Taylor then asked how he was killed and Hoffman informed him that he was killed with an iron bar; whereupon Taylor said to Hoffman, "I guess you pulled off the job, didn't you?" and Hoffman replied, "There you go again, you are always accusing me of things I didn't do."

The State also offered as a witness Mrs. Annie Gasperson, a sister of the defendant Taylor. She testified that at the time of the homicide she lived at Washington, Missouri, and that in September thereafter she first met Hoffman at Washington. Hoffman had come to Washington with defendant Taylor and with a brother of defendant and of the witness, one Redmon Taylor. Hoffman, the defendant and Redmon Taylor remained in Washington for several days and Hoffman told the witness that he and defendant had been "bumming" together for some three or four months. Defendant also said he had been "bumming" with Hoffman about three or four months.

This witness, Mrs. Gasperson, further says that in May, 1911, she visited her mother, who is likewise the mother of defendant, at Tamaroa, Ill. Floyd Taylor was also there at the same time. A conversation occurred there, says Mrs. Gasperson in her testimony, between her and the defendant, in which defendant asked her if she had heard of the man that got killed at Pacific and the manner in which he got killed. Mrs. Gasperson replied that she had not heard and did not know how he got killed, whereupon defendant said, "Well, I do. He was killed with an iron rod and the rod thrown across the railroad from him. I seen the man after he was murdered. They got right smart

of money out of his right shoe and they didn't take off his left shoe." Mrs. Garperson then said to defendant, "Well, you know so much about it you must have been in it." Defendant looked at her, laughed and said, "I and my pal came out from St. Louis on the train with him and had a chat with him, and we came back to St. Louis that night." According to this witness she again upon a subsequent visit to her mother at Tamaroa, in September, 1912, had a conversation with the defendant in which further reference to the killing of this unknown man was made, and in which defendant said to the witness that he understood that a reward had been offered for the murderers, but upon being asked how he learned this was unable to state very readily the source of his information touching this reward; thereupon the witness, Mrs. Gasperson, said to him, according to her testimony, "You know you are lying, for you told me you had seen the man after he was murdered, and that they got right smart money out of his right shoe, but they didn't take off his left shoe." Defendant, she says, then said to her that there was not enough money to get him to go back to Pacific and that there wasn't enough officers to take him back, unless they took him back on a stretcher. The witness then asked him, "Well, what are they after Redmon for, too?" Defendant replied, "They are not after Redmon, they are after me."

This witness was cross-examined at great length by the defendant, but she was not shaken in any material respect. She was not asked as to whether her feelings were friendly or unfriendly toward the defendant, and we are left to infer this fact from a careful consideration of the whole trend of the testimony she gave. She explains how she came to tell the deputy constable Deatherage of the conversations she had with defendant and which conversations she related on the trial. She did not tell Deatherage, it seems from her testimony, until the fact of her having in her posses-

sion information tending to the solution of this murder mystery, had, as she expressed it, "leaked out through the family." The manner in which this leaking occurred is to be gathered from the whole testimony, thread by thread. One McGraw, connected, as was Deatherage, with the railroad as an employee thereof in some capacity, became the son-in-law of Mrs. Gasperson and from him Deatherage learned that Mrs. Gasperson knew facts touching this homicide which might lead to its solution. Deatherage thereupon went to Mrs. Gasperson and by threats practically compelled her to give him the information which she related subsequently on the witness stand. Much other testimony was adduced on the part of the State, but in our view of the case it is not pertinent in solving the troublesome question as to the sufficiency of the testimony to sustain this conviction.

Defendant did not take the stand in his own behalf, neither did his co-indictee Hoffman testify in the case, though they were tried jointly without a severance. Defendant undertook to prove an alibi in that he endeavored to show that he went to work on August 8, 1910, at eight o'clock in the morning, for the St. Louis Dressed Beef Company. This proof, granting its absolute verity and blinking the fact that it contradicts the extra-judicial statements of defendant himself, is of no probative force for the reason that it is not inconsistent in anywise with the theory of the presence of defendant at Pacific during practically the whole of the night of August 7, 1910. So much we say in explanation of the omission of the details of this proffered alibi.

Defendant also offered as a witness in his behalf upon the matter of an alibi, Mrs. Hunter, operator of a hotel and restaurant in St. Louis, at which defendant came to board on July 6, 1910, and which he left on September 16th thereafter. This witness offered her book which seemed to bear out her statement that

the defendant was at her hotel constantly between the dates mentioned. She would not deny, however, that defendant might have missed a meal or even two meals at her house without her knowing it and without her noting it in the book which she kept and by which she refreshed her memory as to the facts about which she testified. Upon the whole the proof of an alibi of defendant is in no sense conclusive and in no sense convincing. In passing we might say, though Hoffman is now out of the case, that the alibi proven on his behalf was a perfect one, if the jury had chosen to credit it.

At the close of all the testimony in the case defendant offered an instruction in the nature of a demurrer to the evidence, which was by the court overruled and exceptions to the action of the court in that behalf properly saved.

Defendant asked the court to give in his behalf the following instruction touching defendant's failure to testify, to-wit:

"The court instructs the jury that the fact that the defendants did not testify in their behalf is not to be accepted by you as evidence of the guilt or innocence of the defendants."

The court gave on the part of the State, among other instructions, one touching which defendant complains. The part of such instruction at which the point made by him is directed, and which fully explains said point, is as follows:

"Bearing in mind these definitions the court instructs the jury that if they believe and find from the evidence that the defendants, Floyd Taylor and Jack Hoffman, in the county of Franklin and State of Missouri, at any time prior to the finding of the indictment herein, willfully, deliberately, premeditatedly and of their malice aforethought, did strike and beat, with a heavy iron bar, one unknown man, and that within a year and a day thereafter, to-wit, on the

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— day of August, 1912, he died from the effects of such striking and beating, they will find the defendants guilty of murder in the first degree, and assess their punishment at the death penalty, or by imprisonment in the penitentiary for a term during their natural life.”

The jury returned a verdict finding both defendant and Hoffman guilty, and as the verdict rendered by this jury is attacked both for matters of form and substance, we set it out in full, so as to show in definite detail the alleged defects and the form of the criticism made against it by defendant. This verdict is as follows:

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Floyd Taylor and Jack Hoffman.

“We, the jury, find the defendants guilty in manner and form as charged in the information and assess their punishment at Life inprison.

“C. A. CUNO,  
Foreman.”

After some weeks spent in considering the motion for a new trial of defendant and of said Hoffman, the court, as stated, sustained said motion as to Hoffman and granted him a new trial, and as to defendant overruled his said motion, and thereupon, treating the verdict rendered by the jury and set out above as a mere general finding of guilty without any assessment of punishment, the trial judge of his own motion fixed the punishment of defendant at imprisonment in the penitentiary for a term of ninety-nine years, and rendered judgment accordingly.

The above statement of facts and of the substance of the testimony of the several witnesses whose evidence is pertinent, is deemed sufficient to make clear the points made by the defendant and the points discussed by us in the subjoined opinion.



I. A number of reasons are urged upon us as bases for a reversal of this case. Among these (a) that the verdict of the jury being joint, is for that reason erroneous; (b) that the court erred in failing to instruct the jury that the statements of Hoffman would not bind defendant; (c) that the verdict for bad form is absolutely void; (d) that the erroneous statement of an instruction for the plaintiff that deceased died August —, 1912, is fatal error; (e) that the court erred in not instructing the jury that defendant's failure to testify in his own behalf should not be accepted by the jury as any evidence of either guilt or innocence, and (f) that the evidence is not sufficient to sustain the verdict. These in their order.

Points (a) and (c) being germane each to the other in that they both deal with the verdict, either as to form or substance, may be considered together. An examination of this verdict shows that it is in several respects informal and contains mistakes of fact. The defendant Taylor and his co-defendant were jointly tried upon a joint indictment regularly preferred by the grand jury and not upon an information as the instruction improperly recites. Is this plain clerical mistake an error? We think not. All men who are sufficiently intelligent to serve as trial jurors know that there are now in this State two methods of preferring felony charges and that the one or the other of these methods is used, according to the convenience or necessities of the case, and according as the expedition of the trial may dictate. The jurors were not in any way misled and if they had been in fact under the impression throughout the trial that the charge had been brought by information rather than by indictment, it is yet impossible to see wherein defendant was hurt. For it may well be that more of weight and legal verity attaches to an indictment found by a jury of twelve of defendant's

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fellow-citizens than attaches to an information filed by only one person.

Upon another phase of alleged error in this verdict, our attention is called to the statute which provides that when several defendants are jointly tried their punishment shall be assessed separately and not jointly. [Sec. 5252, R. S. 1909.] This verdict clearly violates the express letter of this statute. It is also imperfect and irregular in that it assesses the punishment at "life inprison." It does not help or hurt it that defendant's co-indictee, Hoffman, though found guilty with him, was afterward granted a new trial and ultimately discharged upon a *nolle prosequi*. But the learned trial court took the view that notwithstanding the assessment of a joint punishment and the irregularity in the form of the verdict, yet in law it was tantamount to a general verdict of guilty, and a failure to assess any punishment, since the punishment was erroneously assessed. [State v. Gordon, 153 Mo. 576; State v. Thornhill, 174 Mo. 364.] Therefore, the court himself fixed defendant's punishment at ninety-nine years' imprisonment in the penitentiary, as under the statute he was authorized to do (Sec. 5254, R. S. 1909), instead of life imprisonment, as the jury plainly tried to do. We disallow this point to defendant, since the cases last cited settle it, under the facts here, against his contentions.

II. Upon the objection that the court committed error in failing to instruct the jury that the statements made by Hoffman would not bind this defendant, we find two serious reasons for not entertaining it: First, there is not in the record any such statement coming from the lips of Hoffman either about their joint case or about this defendant Taylor's connection therewith, save and except the alleged statement of Hoffman that

Instruction:  
Statements of  
Co-indictee.

- he and defendant had been "bumming" together three or four months, and the record shows defendant said the same thing himself; second, if there had been such testimony, it was defendant's duty to request this instruction, since it is not a matter strictly within the purview of section 5231 (State v. Weinberg, 245 Mo. l. c. 575; State v. Douglass, 258 Mo. 281), but one of the many collateral questions which arise in the trial of a law suit, having to do with the applicability of an alleged part of the testimony, which was of itself competent and binding upon one of the joint defendants. We think that both on the facts and the law this contention should be overruled.

III. Defendant complains that the merely clerical error in the first instruction given by the court wherein the jury are told that if they find and believe "that within a year and a day thereafter, to-

**Instruction:**  
**Wrong Date of**  
**Deceased's Death.**

wit, on the — day of August, 1912," the deceased died, they should find defendants guilty. The alleged vice is that since the proof all showed that deceased was found dead on the morning of August 8, 1910, the clerical mistake in the said instruction whereby the date of his death was stated as August —, 1912, is fatal. This is a palpable slip of the pen. There might be more of substance to the contention if it were not a fact that the jury were also in this instruction expressly required to find that the deceased died "within a year and a day" after he was assaulted. This so fixes the date of death and so clearly cures whatever of error there might or might not be in mistakenly writing the date of the trial in lieu of the date of the alleged crime, that we need not further discuss it. The more so, since there is no Statute of Limitations barring a prosecution for murder, and if the dead man died within a year and a day thereafter as a result of the murderous assault

on him, it is sufficient without regard to the date at which a subsequent prosecution may be instituted.

IV. The contention made that it was reversible error to refuse defendant's offered instruction that the jury should not consider as any evidence of guilt or innocence the failure of defendants to testify in their own behalf, is a little more serious. If the matter were of first impression, I should, in view of the hazyness and ambiguity of section 5243, which says in substance that the failure of accused to testify for himself shall not be construed to affect his guilt or innocence, nor raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place, be forced to the view that since it is the duty of the court to instruct "on the law of the case," and since this solemnly enacted statutory presumption is a part of the law of the case, and since the jury get the law in all law suits (except libel and slander suits), from the court, they ought to be told of the law in this statute, when the facts, as here, fully warrant. As forecast, it is a little difficult to find out precisely what the above section means. It is ambiguous and in a way "steps upon its own feet," in this, at least, that while it says that defendant's failure to testify shall not be construed to effect the innocence or guilt of the accused, in the very next clause it forbids the matter of defendant's failure to testify to be even *considered* by either trial court or trial jury. Be this as it may be, it has been said that it is not error to refuse to give this instruction. [State v. Robinson, 117 Mo. 649.] If the lawmakers intended that the jury should, in a proper case, be instructed not to consider such failure of defendant to take the stand as a witness for himself, as affecting in anywise his guilt or innocence, it would have been just as well to omit

the clause forbidding such consideration. Nevertheless, *stare decisis*, and we see no reason to take a backward step, when so many forward steps are being demanded as things of crying need.

On the other hand, an instruction given by the court *sua sponte* over defendant's objections, to the effect that the jury should not consider the failure of defendant to testify in his own behalf as affecting his guilt or innocence, has been held not to be error. [State v. DeWitt, 186 Mo. 61.]

It follows that upon authority, we must disallow this contention, with the suggestion that in a proper case, it would seem a little fairer to the defendant to give this instruction if he wants it, until such time as the Legislature may see fit to clarify the present dark and muddy language of the section under discussion.

V. We come next to consider whether the evidence adduced upon the trial was sufficient to sustain the conviction of this defendant. The learned trial court properly held that it was not sufficient to prove Hoffman's guilt and as to him sustained a motion for a new trial. The point made in an assignment of error not otherwise noticed, that such act of the court in a case like this *ipso facto* sustained a similar motion for a new trial in the case of this defendant, is trivial, and needs for its refutation but the bare statement of the contention.

The question of the sufficiency of the evidence is a serious one in this case. That defendant was convicted largely by the testimony of his own sister, is clear, but while clear it is against human experience and makes of this a weird and strange case. If the learned trial court had sustained the motion for a new trial, as he lawfully could have done (Ewart v. Peniston, 233 Mo. 695; State ex rel. v. Ellison, 256 Mo. 644), and as we think he ought to have done, we could

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not under the law have interfered, and upon the facts would not have interfered if we could. But since the court *nisi*, having the right to set aside this verdict, refused so to do, when to have done so would have been to err upon the side of doubt and mercy if at all, ought we to do so, and have we the right under the law to do so. The law and the facts which will justify us in upholding a trial court in setting aside a verdict on account of the insufficiency of the evidence, or the uncertainty of it, by reason of suspected perjury (which is in effect the same thing), differ diametrically from the law and the facts which will justify our convicting the trial court of error where he refuses to set a verdict aside. [State ex rel. v. Ellison, *supra*.] Here the weight of the evidence and the credibility of the witnesses were wholly for the triers of fact and not for us as soon as the verdict of the jury met the approval of the trial court, and of course in all criminal cases this is so whether it so met the court's approval or not. If there be found in the whole case as to defendant any substantial evidence of his guilt, we must defer to the verdict of the jury and sustain this conviction. [State v. Concelia, 250 Mo. 411; State v. Maggard, 250 Mo. 335.]

That the man was murdered and robbed in Franklin county, Missouri, on the night of the 7th day of August, 1910, there is and can be no serious question made. That two lethal weapons were used and that therefore two persons were implicated, the evidence plainly shows. Did the defendant take part in this killing is the only question left on which to look and see if there be evidence enough to go to the jury. The negro Yancey is so doubtful in his identification of the defendant and so shaken by cross-examination that, but for the defendant's own extra-judicial statements to officers Schmidt and Fleming of the police force of St. Louis and to the deputy constable Deatherage, we should be compelled to say that his testimony is in-

credible and worthless for any purpose. But defendant himself corroborates Yancey in many points, in that he admits he was in Pacific in company with Hoffman and the dead man, and that he was in the saloon there and canning beer with the dead man and Hoffman practically just as Yancey says he was.

The little girl Rachel Caveness, who is not at all shaken on her cross-examination, likewise identifies Taylor and Hoffman as being in Pacific on August 7, 1910. Defendant, after admitting to the officers his presence with the dead man at Pacific on the Sunday evening before the latter was killed, insists that he left Pacific for Washington, Missouri, before night; that he last saw deceased and Hoffman in company on the platform of the railroad station in Pacific at about seven o'clock on said Sunday evening and that he remained some two days at Washington. Upon the trial he seeks to prove an alibi by showing he was at work on Monday, August 8, 1910, and taking his meals at his boarding house. His alibi was for the jury, of course, but their finding on it is justified by its flimsiness and lack of congruous coherency. But this, it may be urged, only shows his presence in Pacific on the fatal Sunday in company with the dead man, and of itself is not sufficient. We grant that it would not be any substantial proof of guilt if it stood alone. [State v. Francis, 199 Mo. 671.] If, however, the testimony of defendant's sister is to be believed, he told her such facts as indicated his presence when the man was killed. No other witness in the case tells of getting money off the dead man. Yet defendant, according to his sister, says that the murder was done with an iron rod; that he (defendant) saw the man after he was murdered; that one of his shoes was taken off—the right one was taken off, but not his left one—and that a "right smart of money" was gotten out of his right shoe. Unless defendant was present when deceased was killed, he could not have seen this man.

so far as all the other evidence in the case, including his own statements to the officers, shows. No other witness in the case said, or seemed to know, how much money or whether any money was gotten from the dead man's shoes, except defendant himself, as disclosed by his own statements to his sister. Again, defendant vainly boasting says, according to his sister, that "there were not officers enough to take him back to Pacific, unless they took him back on a stretcher," and that the officers were not after Redmon Taylor, the defendant's brother, but that they were after defendant himself.

Defendant's sister does not evince any hostility or unfriendliness toward him. She was not asked as to her feelings toward him and so neither she nor any one in the case tells us whether her testimony was tinged by hostility or enmity toward defendant. We can only ascertain this fact from her whole manner of testifying. We note that she at first refused to divulge to the railroad special agent and deputy constable Deatherage—who seems to have been a sort of self-constituted, or a reward-animated Nemesis upon defendant's trail—whether she knew anything about her brother's connection with the case or not. Later when Deatherage obtained such definite information touching this sister's knowledge of this case, she then felt she ought to divulge all she knew, which she accordingly did. She does not seem to have been a volunteer, but finding, as she admits in her testimony, that her knowledge of some of the facts had "leaked out," as she expresses it, through the family, she either felt afraid to deny, or felt impelled by her regard for the truth to admit, her knowledge of what the defendant had told her of this murder. One McGraw was the son-in-law of Mrs. Gasperson, the sister of defendant. McGraw, also a railroad man and an acquaintance of Deatherage, was the family spigot through whom the information leaked out to Deather-



age. The testimony of this witness bears the earmarks of verity. No animus is shown by the proof, and none is to be gathered therefrom by inference from her manner on the stand, as the record shows it. She denies vigorously that she expected any reward for her testimony, as is insinuated by the cross-examination of defendant. In fact, she would have been foolish to expect any directly, and she denies any hope of any indirectly through any secret agreement with Deatherage. If she was to be believed, and her testimony was for the jury, there was sufficient evidence to go to the jury and this judgment should be affirmed. Let this be done.

*Walker, P. J., and Brown, J., concur.*

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J. WILLIAM CHILTON v. LEANDER F. NICKEY,  
Appellant.

Division Two, July 14, 1914.

1. **EVIDENCE: Patents to Land: Certification of Copies.** Copies of land patents certified by the Recorder of the General Land Office at Washington, are receivable in evidence.
2. **TAX SALE: Unknown Heirs.** The petition in a tax sale must describe the interests of the unknown heirs of a deceased owner, otherwise a sale under a judgment rendered thereon is void. After the death of the owner of the land, his heirs must be properly sued, served and allowed their day in court, else their title is not affected by judgment.
3. **SUIT TO QUIET TITLE: Legal Title: Adverse Possession: Issue of Law: Verdict.** Where in a suit to quiet title the plaintiff stood on his legal title and the defendant claimed under the thirty-year Statute of Limitations, a square issue of law resulted, and the verdict of the trial court on that issue is conclusive.
4. ———: ———: ———: **Preponderance of the Evidence.** One claiming under the thirty-year Statute of Limitations must establish his possession by a preponderance of the evidence.

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5. **LACHES: Not Defense to Claim Under Legal Title.** The doctrine of laches is only applied to defeat a claim for some equitable relief. It is no bar to a claim made under a legal title.
6. **SUIT TO QUIET TITLE: Ownership in Others than Parties.** Where the evidence in a suit to quiet title shows that a portion of the land in suit did not, when the suit was instituted, belong either to plaintiff or to defendant, there can be no adjudication as to that portion.
7. **——: Taxes: Not Pleaded: Judgment.** Where defendant's answer made no claim for taxes paid on land bought at an invalid tax sale, but a certain sum was put in evidence, the Supreme Court will render judgment, in a suit to quiet title, which went against defendant, for an amount proportionate to the sum paid by defendant upon that part of the land adjudged to belong to the plaintiff.

Appeal from Butler Circuit Court.—*Hon. J. G. Sheppard*, Judge.

**AFFIRMED** (*as modified*).

*E. R. Lentz* for appellant.

(1) The proof in this case shows conclusively that neither plaintiff nor those under whom he claims have ever been in possession of the land in controversy or any part thereof, nor did the plaintiff or any one under whom he claims, pay any taxes on the land in controversy or any part thereof for more than thirty-five years next before the commencement of this suit. But on the other hand, the proof shows that the defendant, by his agent or tenant, has been in the actual possession of a part of the lands in controversy for more than one year next before the commencement of this suit, under claim and color of title to the whole and exercising the usual acts of ownership over the whole of the said lands and paying the taxes thereon and by reason thereof plaintiff's right of action is forever barred. *R. S. 1909, sec. 1882; Campbell v. Greer, 209 Mo. 215; DeHatre v. Edmonds, 200 Mo. 278; Crain v. Peterman, 200 Mo. 297.* (2) The decree in the

case of Leander F. Nickey v. Henry C. Wright et al., rendered on the 23d day of April, 1906, and read in evidence in this case, constituted color of title on all the lands therein described, from the date of rendition and recording of said decree. And this is true even though the decree or judgment is, for any reason, irregular or even void. 1 Cyc. 1100-4; Jones v. Thomas, 124 Mo. 589; Brewing Co. v. Payne, 197 Mo. 428; Dunnington v. Hudson, 217 Mo. 100. (3) This plaintiff and those under whom he claims have been guilty of laches and are barred thereby from having or maintaining this action. Morrison v. Turnbaugh, 192 Mo. 447; Rutter v. Carothers, 223 Mo. 631; Shelton v. Horrell, 232 Mo. 358. (4) In this case it makes no difference whether the Henry C. Wright under whom plaintiff claims was the Henry C. Wright to whom these lands were conveyed, nor whether he was alive or dead at the time that these various tax suits were brought against him, or whether the judgments rendered in the tax suits were valid judgments or not, nor whether the decree in favor of Leander F. Nickey in the case of Nickey v. Wright, was a valid decree or not, they were nevertheless color of title and if these instruments showed that Nickey was the apparent owner of the title to all the lands in controversy, and was in possession of any part of the said lands, under claim or color of title, claiming the whole of the said lands, then defendant's right to action is barred as to all of the said lands. (5) If plaintiff, or those under whom he claims, have abandoned their claim of title to the lands in controversy or have been guilty of laches then plaintiff cannot recover in this case, no matter what title his immediate or remote grantors may have had, nor whether the defendant has been in the actual possession of the lands or not. (6) The copies of the patents from the United States to Henry C. Wright and to Alois Menne for the lands in controversy were improperly

admitted in evidence for the reason that they were not certified to by anybody as being correct copies and for the further reason that no proof had been made that original patents had ever been issued, or that if issued, the original patents had not been accounted for so as to admit as secondary evidence, the copies which were introduced.

*James Orchard* for respondent.

(1) "The copies of any patents, records, books, or papers in the general land office, authenticated by the seal and certified by the recorder of such office, shall be evidence equally with the originals thereof to the same force and effect as when certified by the commissioner of said office." Act of April 19, 1904, chap. 1396; 33 U. S. Stat. at Large, p. 189; 10 Federal Statutes Annotated, p. 354. It is the duty of the recorder of the general land office at Washington to certify all patents that may be issued from the office of the commissioner of the general land office. R. S. United States, sec. 459; 6 Fed. Stat. Ann. p. 217. An exemplification of a patent certified by the recorder of the general land office, may be introduced in evidence without proof of the loss of the original patent. *Barton v. Murrain*, 27 Mo. 235; Sec. 6293, R. S. 1909.

(2) The finding by the trial court that respondent's grantors were the heirs, and sole heirs, of Henry C. Wright, deceased, is supported by the same presumptions as support a jury's finding in an action at law, and will not be disturbed by this court. *Williams v. Sands*, 158 S. W. 47. (3) Identity of name is prima-facie evidence of identity of person, from which the trial court was warranted in finding that Henry C. Wright, the ancestor of plaintiff's grantors was the same Henry C. Wright who owned the land in controversy, and that finding will not now be disturbed by this court. *Gage v. Cantwell*, 191 Mo. 698; *Gitt v.*

Watson, 18 Mo. 274; Flourney v. Warden, 17 Mo. 435; State v. Moore, 61 Mo. 276; State v. McGuire, 81 Mo. 642; Williams v. Sands, 158 S. W. 47. (4) A tax suit brought against a man who was dead at the time, though shown by the deed records to have been the owner of the land, is void, and does not affect the title of his heirs, to the land. Williams v. Hudson, 93 Mo. 524; Stafford v. Fizer, 82 Mo. 393; Adams v. Gassom, 228 Mo. 566. (5) A tax suit brought against the heirs of a deceased owner of real estate as "unknown persons," is void if the petition and order of publication therein do not describe the interest of such unknown persons in the land. Land & Mining Co. v. Land & Cattle Co., 187 Mo. 420; Davis v. Montgomery, 205 Mo. 271; Huiskamp v. Miller, 220 Mo. 135; Betts v. Staley, 76 Mo. 158. (6) Acts of ownership and authority exercised over land by a claimant thereof, such as cutting timber, surveying the land, keeping other trespassers off, and even paying taxes thereon, do not constitute actual possession, within the meaning of the law of limitations. Pharis v. Jones, 122 Mo. 125; Nye v. McAlfter, 127 Mo. 529; Himmelberger-Harrison Lbr. Co. v. McCabe, 220 Mo. 154; Chilton v. Comanianni, 221 Mo. 685; Weir v. Cordz-Fisher Lbr. Co., 186 Mo. 397; Carter v. Hornback, 139 Mo. 244; Morgan v. Pott, 124 Mo. App. 371. (7) Actual adverse possession of land, in order to ripen into title must be continuous for the legal limitation period invoked. Possession cannot be tacked as between a prior and subsequent occupier of land, unless there was colorable transfer of the first possessor's claim to the last. Maysville v. Truex, 235 Mo. 619; Crispin v. Hannavan et al., 50 Mo. 549; Adkins v. Tomlinson, 121 Mo. 493. And there is no difference in the character of the possession of a claimant required to sustain the thirty-year Statute of Limitation, and that which will sustain the ten-year Statute of Limitation. The only difference is the time the occu-

pant must have held the land in such adverse possession. *Chilton v. Comanianni*, 221 Mo. 685. (8) The finding as a fact by the court sitting as a jury, upon the evidence adduced, that appellant had not had such actual possession of the land in controversy as would support his plea of the thirty-year Statute of Limitation, is conclusive of that fact, and will not be disturbed by this court. *Nickey v. Leader*, 235 Mo. 30; *Williams v. Sands*, 158 S. W. 49; *Daman v. Remme*, 246 Mo. 233; *Griggs v. Bridgewater*, 167 Mo. App. 342; *Blair v. Blair*, 247 Mo. 61; *Renting & Investment Co. v. Bernardon*, 152 S. W. 1105. (9) Failure of the owner of land to take possession thereof, or to sue to quiet the title thereto, and even the non-payment of taxes thereon—for any length of time whatsoever, are acts which do not of themselves bar or estop such owner from asserting title at any time or in any manner that may suit him. *Haarstick v. Gabriel*, 200 Mo. 237; *Burkham v. Manewall*, 195 Mo. 500; *Manwarring v. Lbr. & Mining Co.*, 200 Mo. 718; *Wear v. Cordz-Fisher Lbr. Co.*, 186 Mo. 388; *Hays v. Pumphrey*, 226 Mo. 119; *Brewster v. Land & Imp. Co.*, 247 Mo. 209. (10) The testimony of respondent's grantor, P. M. Wright, does not sustain the contention of appellant that respondent's grantors had abandoned the land and did not claim to own it at the time they sold it to respondent. But even if said testimony would bear out such inference, it could not affect the title of respondent so acquired, because it is not permissible for a party to impeach the title he sells by statements and declarations made after such sale. *Benevolent Society v. Murray*, 145 Mo. 623; *Garrit v. Wiltse*, 161 S. W. 694; *Marshall et al. v. Hill*, 246 Mo. 1.

ROY, C.—Suit to quiet title in which judgment was for plaintiff. The land is the northeast

Suit to Quiet  
Title.

quarter, and the west half of the southeast quarter, of section one; also the southeast quarter and lot one of the northeast quarter of section two, all in township twenty-three, range four east. It is wild timber land with no improvements, as hereinafter stated.

The answer contained a general denial, except that it admitted a claim of ownership by defendant, and pleaded the thirty-year Statute of Limitations as to that part of the land in section one.

The plaintiff read in evidence a copy of a patent issued to Henry C. Wright of Warren county, Missouri, for that part of the land in section one, dated September 1, 1859, and a copy of a patent to Alois Menne, for the lands in section two. Each of these instruments was certified as follows:

“Department of the Interior, General Land Office, Washington, D. C., Oct. 12, 1910.—I hereby certify that the annexed copies of patents are true and literal exemplifications from the records in this office. In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal)

“H. W. LANYARD, Recorder of General Land Office.”

To these copies of the patents the defendant objected for the reason that they were not authenticated as required by the Act of Congress or in any other manner. The objection was overruled and defendant excepted.

Plaintiff read in evidence a warranty deed from Alois Menne to Nicholas P. Stephenson for the land in section two, dated December 15, 1857, and recorded December 15, 1868; also a warranty deed from said Stephenson to Henry C. Wright for the same land, dated May 29, 1858, and recorded June 14, 1860.

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Wright died May 15, 1880, and left surviving him three children and the descendants of two deceased children. The plaintiff acquired the interests of all the heirs except those of Mrs. Robert Williams, Mrs. DeMuth, Alton Easton and W. R. Easton, the descendants of a deceased daughter of Wright, said interest being one-fifth of the land. P. M. Wright, a son of Henry C. Wright, testified for plaintiff, and on cross-examination said that he did not know where his father's deeds to the land were; that the taxes had not been paid by his father or his heirs since 1875, that the heirs got \$100 from Mr. Chilton for the land, and that he was satisfied with that price because he knew it had been sold several times for taxes, and that it would necessitate trouble and expense to recover it.

As to the defendant's title, it is sufficient to say that at various times from 1883 to 1903 different portions of the land were sold for taxes in suits against Henry C. Wright and during that time all the land was so sold for taxes, some portions of it being sold several times. The east half of the northeast quarter and the northwest quarter of the northeast quarter of section one was sold for taxes on October 21, 1903. Defendant read in evidence a sheriff's deed under a judgment for taxes against Henry C. Wright, the unknown heirs of Henry C. Wright, deceased, the unknown devisees of Henry C. Wright, deceased, and others, to the defendant herein. The deed was dated April 13, 1907.

The plaintiff, in rebuttal, read in evidence the petition in the tax suit last mentioned. It did not describe the interests of the unknown heirs of Henry C. Wright in the land and did not allege that the interests of such unknown heirs in the land were unknown to the plaintiff.

The defendant after January 1, 1900, and prior to 1906, acquired the title of all the purchasers at the



various tax sales. On April 23, 1906, a decree was rendered in the circuit court of Butler county in the case of Leander F. Nickey v. Henry C. Wright, Joseph Gardner, H. B. Powers and others, quieting the title to the land in said Nickey. The heirs of Henry C. Wright were not parties to that suit, nor was the plaintiff.

There have never been any improvements on the land in section two. In April, 1906, the defendant sold the tie timber on the land in section two under the agreement that the purchasers were to remove the timber within two years. The purchasers during the time limited cut and removed the tie timber. The defendant testified that about six years before the trial he turned all the land over to Joseph Gardner, who agreed to take care of it for defendant for the use of the house then on the place, and the tillable land. There was a small box house on the northeast corner of section one, near which there was about an acre of ground that had been cultivated at some time not shown in the evidence. When the house was built is not shown. Defendant testified that he had the land in section two surveyed and that he cut brush off the land in order to keep timber thieves away. He sold an acre from the tract for a schoolhouse.

The defendant in his testimony disclaimed personal knowledge of other acts of ownership on the land except that he had put Gardner in charge of it. Gardner testified that he had been in possession of the land since the defendant put it in his charge. When asked about his acts of ownership, he said:

“Q. Well, just tell how you got possession of it?

A. I asked permission of Mr. Nickey to have possession of the place for the simple reason I would know who lived there, then if I had control of it—and he told me to go ahead and use it as my own, or something to that effect; he said go ahead and take care of it and keep the rails from getting burned and

keep the fellows from cutting the timber off the land. I know something was said about timber, and I have had possession of it since that—and didn't you ask me in what way I have used it?

"Q. Yes, sir. A. Well, I had a family living in there once.

"Q. How long? A. I believe, maybe twice; I gave my consent once for a family to move in there, and another time I had a family living in there for my own benefit, that was working for me.

"Q. Go on. A. And that has been two years ago since the last family lived in the house. Since that time I used the house to put hay in in the winter—the fall of the year I feed my cattle around the house, in the winter time. In the summer time it makes the finest kind of a shophouse.

"Q. Is there any of the land that is inclosed by fence? A. Why, I have three barbed wires running across there, the neighbors out there don't call it much fence.

"Q. Well, does it inclose any land? A. Yes, sir, it incloses a part of this tract. It incloses the house and, just an off-hand guess, I would say ten acres of the land."

He further testified that the first man who lived in the house with his permission was Thomas Powers, who occupied it a month, and that the other was Mento Murphy, who lived there about six months; that he put the wire fence there early in the spring before the trial. There had previously been a rail fence around the house and enclosing about ten acres of the land, but it had been partly burned and was not used. The house and rail fence had been constructed prior to the acquisition of any title by the defendant, and the house was not occupied at the time defendant put Gardner in charge. The defendant put in evidence receipts for taxes paid on the east half of the

northeast quarter and the northwest quarter of the northeast quarter of section one, amounting with interest to \$39.73. The answer made no claim on account of taxes paid by defendant.

I. Defendant's objection to the copies of the patents as evidence was not well taken. Those copies were certified by the recorder of the **Copies of Land Patents:** general land office at Washington, D. C. **Certification.** The use of such copies so certified is provided for by 33 U. S. Statutes at Large, p. 189, and by section 6293, Revised Statutes 1909.

II. The only tax suit in which any attempt was made to proceed against the heirs of Henry C. Wright was the one under which a sale was made **Tax Sale:** in 1907 for a portion of the land. The **Unknown Heirs.** petition in that case did not describe the interests of the unknown heirs of Henry C. Wright in the land, and, for that reason, the sale thereunder was void. [Davis v. Montgomery, 205 Mo. 271; Land & Mining Co. v. Land & Cattle Co., 187 Mo. 420.] After the death of the owner of the land, his heirs must be properly sued, served and allowed their day in court. Otherwise the proceedings are void. [Adams v. Gossom, 228 Mo. l. c. 577.] It results that all the tax sales were void.

III. In Morrison v. Bomer, 195 Mo. 535, it was held that one claiming by adverse possession for ten **Legal Title:** years must show such adverse possession by a preponderance of the evidence. **Adverse Possession:** **Issue of Law:** It was also held in that case that the **Verdict.** question of adverse possession was one for the triers of fact, and there being evidence on which to base the finding, it was conclusive on the parties. The same rule as to a preponderance of the evidence applies in this case. The plaintiff stood on

the legal title; the defendant claimed by the thirty-one-year Statute of Limitations. It was a square issue at law, and the verdict of the trial court is conclusive.

A close examination of the evidence shows that the proof for the defendant as to his possession for one year before suit brought, even if its truth be conceded, is subject to more than one construction. The trial court could have refused to believe defendant's evidence, or, taking it as true, it may have found that it did not show continuous actual possession for a year by the defendant.

IV. Appellant insists that the plaintiff is barred by laches. The doctrine of laches is only applied to defeat a claim for some equitable relief.

**Laches.**

It is no bar to a claim made under a legal title. It was expressly so held in *Hayes v. Schall*, 229 Mo. l. c. 124. In no case in this State has it been held that laches is a bar to a claim made under a legal right as distinguished from an equitable claim or title.

V. It clearly appears from the evidence that one-fifth of the land at the date of the institution of this suit did not belong to either the plaintiff

**Ownership  
not in Parties.**

or the defendant, but to the heirs of the deceased daughter of Henry C. Wright, named in the foregoing statement. The judgment of the trial court is hereby modified so as to adjudge and decree in the plaintiff the undivided four-fifths of the land, and no adjudication as to the other fifth is made.

VI. In accordance with the precedent set for us in *Mangold v. Bacon*, 249 Mo. l. c. 50, we modify the judgment of the trial court by rendering judgment

Taxes: Not  
Pleaded.

here in favor of the defendant for four-fifths of the taxes and interest on that portion of the land sold for taxes in 1903, to-wit: The sum of \$31.78, and the same is declared a first lien on plaintiff's interest in the east half of the northeast quarter, and the northwest fourth of the northeast quarter of said section one.

The judgment as thus modified is affirmed. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of *Roy, C.*, is adopted as the opinion of the court. *Walker, P. J.*, and *Brown, J.*, concur. *Faris, J.*, concurs in result.

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FRITZ DARROW, Appellant, v. C. H. BRIGGS et al.

Division Two, July 14, 1914.

1. **BREACH OF CONTRACT: Employment: Indeterminate Term: Termination: Abuse of Discretion.** A petition which charges that the period of plaintiff's employment as a member of a college faculty was indeterminate; that is to say, that it was for a period of one year, with the understanding and agreement that he would be retained at the discretion of the board of trustees beyond said first year without any formal employment or renewal of said contract if his educational work was satisfactory and no personal objections could be urged, and that said board by its articles of association and by-laws could remove after said year any instructor when in the judgment of said board the interest of the college shall require it, and further alleging that said board discharged plaintiff, at the end of the first year, without assigning any other cause except that in the judgment of the board the interest of the college required that his term of service should close, does not state a cause of action for damages for a breach of contract, unless it contains further allegations showing that the board abused its broad discretion to terminate his employment.
2. ———: ———: ———: ———: ———: **Teaching Theosophy: Newspaper Controversy.** A board of trustees of a college, whose charter and by-laws forbid any religious or political

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test, either in instruction or in the employment of teachers, but authorizing the "board to remove any teacher when the interest of the college shall require it," does not breach its contract by which plaintiff was employed for one year and permanently thereafter "if after said probationary period of one year there is no difficulty," or abuse its discretion, by terminating plaintiff's employment at the end of one year and assigning no other reason than that the interest of the college requires that his term of service should close, where plaintiff has avowed his devotion to the cult called "Theosophy" and has allowed himself to be drawn into heated newspaper controversies with ministers and others in defense thereof—even though he was nagged into such controversy by the intemperate attacks of said ministers. Such dismissal was in the interest of the college, and was not an abuse of the board's discretion.

3. **CONSPIRACY: Petition: Cause of Action.** In an action on the case in the nature of a writ of conspiracy, the plaintiff may have judgment against one defendant, although he may have no cause of action against the others. But the action can only be sustained against several defendants where the acts complained of would sustain an action against one of them. An allegation that all defendants conspired together does not authorize the defendant to maintain his action when he could not maintain it against one of them if he were sued alone. A conspiracy of itself furnishes no cause of action, because from the mere forming of it no possible damages can accrue.
4. ———: ———: ———: **Libels and Slanders: Breach of Contract.** Although the petition contains averments of libels and slanders uttered by one defendant sufficient, if properly pleaded with a proper legal setting, to put him on his defense for actionable utterances, yet if the whole trend of the other allegations is that the other defendants had no part in them, and, not seeking to hold him or the others liable for libel, but, by a charge of conspiracy, seeks to recover damages from the others for a breach of a contract of employment committed by said others, induced thereto by a communication to them of said libels by said defendant, but further charging that said defendant in communicating them to the others acted alone, the petition does not state a cause of action for a conspiracy resulting in plaintiff's discharge from such employment.
5. **PLEADING: Incoherent: Non-Understandable.** A petition whose allegations are incoherent and present no understandable issues, is bad on demurrer, since it is still the rule that the pleader is not allowed, by inserting doubtful and uncertain allegations in his pleading, to throw upon his adversary the hazard of correctly interpreting its meaning.

Appeal from Greene Circuit Court.—*Hon. James T. Neville*, Judge.

AFFIRMED.

*Delaney & Delaney* for appellant.

(1) Under the allegations of the petition, the plaintiff had a subsisting contract of employment as a member of the faculty of Drury College. The dismissal of plaintiff without just cause, as it was, is a breach of such contract and would entitle plaintiff to recovery against Drury College. (2) Under the allegations of the petition, the defendant Briggs was guilty of slander and of libel. His language and writings were calculated to hold plaintiff up to general ridicule and contempt. Briggs did more than merely criticise the religious beliefs of plaintiff. These criticisms affected the standing of plaintiff as a man, were so intended, and exposed him to ridicule and contempt. They affected his standing as an educator and as a member of the faculty of Drury College, were so intended, and exposed him to ridicule and contempt with reference to his profession. His fairness, integrity, honesty and manliness are directly questioned, and it is charged specifically that mentally and morally he is unfit to be an educator, especially an educator of Drury College. The language and writings bring this case squarely within the principles declared in the following authorities: *St. James' Academy v. Gaiser*, 125 Mo. 517; *Kemble v. Sass*, 12 Mo. 499; *Price v. Whitely*, 50 Mo. 131; *McGinnis v. Knapp*, 109 Mo. 131; *Spurlock v. Lombard Co.*, 59 Mo. App. 225; *Baldwin v. Walser*, 41 Mo. App. 243. If it be actionable, as declared in the *St. James' Academy v. Gaiser*, *supra*, to threaten to boycott a college for tolerating dancing, certainly it is actionable to threaten a college with a boycott, as alleged in petition, to-wit, for keep-

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ing in its faculty a man who is unmanly; who is mentally and morally unfit to be an educator; who is declared to be an ally of his Satanic Majesty; who is untruthful; who is guilty of duplicity. *Wildie v. McKee*, 111 Pa. St. 335; *Gregory v. Brunswick*, 6 M. & G. 205; *Morasse v. Brochu*, 151 Mass. 574; *Odgers on Libel and Slander*, p. 89; *Crump v. Com.*, 84 Va. 927; *Jackson v. Stanfield*, 137 Ind. 609. A libel may be actionable even though motive be good. *Com. v. Snelling*, 15 Peck, 337; *Jellison v. Goodwin*, 43 Me. 287; *Shurtleff v. Parker*, 130 Mass. 293. Words which on the face of them when falsely published of a party in connection with his trade or profession must necessarily injure him with respect thereto, or which directly tend to the prejudice of such person in his profession, are actionable. *Newell on Defamation*, sec. 1, p. 168; *Morasse v. Brochu*, 151 Mass. 567; *Price v. Conway*, 134 Pa. St. 340; *Odgers on L. & S.* (2 Ed.), 65; *Williams v. Davenport*, 42 Minn. 393; *Railroad v. Richmond*, 73 Tex. 568; *Sanderson v. Caldwell*, 45 N. Y. 398; *Hayes v. Press Co.*, 127 Pa. St. 642; *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187; *Kemble & Field v. Sass*, 12 Mo. 499; *Price v. Whitely*, 50 Mo. 439; *Burke v. Fay*, 128 Mo. App. 690. A combination to injure the business of another by threatening to injure the business of others who have business relations with them, is an unlawful combination. *Lohse Co. v. Fuelle*, 215 Mo. 421. So the threat to injure *Drury College*, if it retained *Prof. Darrow*, the plaintiff, is a conspiracy against plaintiff. Nor can the claim of privilege on the score of religious criticism be invoked. This claim of privilege could only be colorable, as the individual is attacked as well as the creed. Besides, we allege malice and falsity. There is no privilege where there is malice. *State v. Derry*, 20 Mo. App. 552; *Landis v. Campbell*, 79 Mo. 433. And, at all events, these are questions for the jury. *Const. of Missouri*, art. 2, sec. 4; *Lewis v. Humphries*, 64 Mo.



App. 466; *State v. Armstrong*, 106 Mo. 395; *St. James' Academy v. Gaiser*, 125 Mo. 517. But we are not suing either for breach of contract or for libel or for slander or for any two or for all together, as was erroneously assumed by the trial court. So assuming, the court held there was a misjoinder of parties and misjoinder of causes of action and held the petition bad for duplicity or multifariousness. The court consequently sustained the separate demurrers and dismissed the petition. We are suing on the case for conspiracy, and allege that the objects of the conspiracy were: To defame and injure plaintiff as a man and to expose him as a man to public contempt and ridicule; to defame and injure plaintiff as an educator, to represent him as unfit mentally and morally for his profession generally and especially as a member of the faculty of Drury College. The purpose of defendants was to secure plaintiff's dismissal from such faculty, notwithstanding a valid, subsisting contract, on the ground that his conduct as teacher and his relations to such college were unfair, unmanly, dishonest, underhanded and despicable. And we allege that by such means the dismissal of plaintiff was secured and that the resolution of dismissal justified inferences unfavorable, injurious and damaging, financially and otherwise, to him, plaintiff. And we contend that the facts stated in the petition constitute a conspiracy. (3) Conspiracy in its civil aspect, considered as a ground of an action on the case for damages, partakes of none of the distinguishing characteristics of the criminal offense. The "gist" in a civil action is the damage, not the conspiracy. 6 Am. & Eng. Ency. Law (2 Ed.), 873 and notes. Even if the facts pleaded do not state a cause of action against all the defendants, yet, if the petition states a good cause of action against two of them, it must be sustained as to them. And even where a conspiracy is charged, if the facts pleaded (or the evi-

dence adduced) fails in the conspiracy, recovery can be had against the one actually committing the wrong. *Halborn v. Naughton*, 60 Mo. App. 100; *Hunt v. Simonds*, 19 Mo. 588; 6 Am. & Eng. Ency. Law (2 Ed.), 872-873. Therefore the court erred in sustaining all of the demurrers. So if defendant Briggs had the legal right to criticise the religious views of plaintiff, he should have done so without assailing plaintiff personally. It is one thing to assail the creed; it is quite another to ridicule and revile the follower. It is one thing to say that Theosophy is a "fad" and should not stand before the verities of the Christian religion, but is quite different to say that plaintiff is proselyting in an underhanded, unmanly way; covertly, surreptitiously, dishonestly taking advantage of his position on the staff of a Christian college. So, Briggs being liable, under the allegations of petition showing agreement, encouragement, participation and overt acts by the defendants George and Drury College, they also are liable. (4) One need not be an original contriver of the mischief. Those who subsequently enter into a design already formed become equally guilty, and the subsequent acts relate to the original design. *State v. Walker*, 98 Mo. 95; 6 Am. & Eng. Ency. Law (2 Ed.), 485, notes. So the fact that George did not join in the conspiracy until Drury College was threatened by Briggs and by the individual members of the Ministerial Alliance is no defense. Nor is it a defense for the college to say, "We joined only in the actual dismissal." That was the object, the finishing touch in the conspiracy, and the college, under the allegations of the petition, not only made itself a party to the transaction, but so worded the resolution as to justify unwarranted inferences and thus increase the damage and intensify the wrong. (5) The petition is not vulnerable to the charge of being multifarious. Distinct facts forming a series of transactions tending to a common end do not con-

stitute multifariousness. *McGlothlin v. Henery*, 44 Mo. 350; *Mayberry v. McClurg*, 51 Mo. 256. Matters and parties may be joined and united if there is some common point of interest. Bliss Code Pldg., sec. 110. No matters, however multifarious, will operate to make a pleading double that altogether constitute by connected statement and relation one entire transaction. Bliss Code Pldg., sec. 294; *Perkins v. Baer*, 5 Mo. App. 70; *Hess v. Ganz*, 90 Mo. App. 439.

*W. M. Williams* for respondent Briggs.

(1) The petition attempts to plead several distinct causes of action, in which the defendants have no joint interest; one for breach of contract against Drury College, another for libel against defendants George and Briggs, and still another for slander against defendant Briggs. The demurrer was properly sustained. *R. S. 1909*, sec. 1795; *Stalcup v. Garner*, 26 Mo. 72; *Otis v. Mechanics Bank*, 36 Mo. 128; *Fadley v. Smith*, 23 Mo. App. 92; *Ederlin v. Judge*, 36 Mo. 351. (2) Plaintiff was not employed for any specific term by Drury College. His tenure, by express agreement, was subject to the discretion of the board of trustees, and could be terminated at any time when in the judgment of the board the interest of the college might require it. 26 Cyc. 972. (3) The board of trustees having the discretion to remove the plaintiff from its faculty whenever deemed proper by the board, there can be no actionable conspiracy by said college and its co-defendants to bring about that result. "An action will not lie for a conspiracy to do a lawful act." *Hunt v. Simmons*, 19 Mo. 583; *Hunt v. Johnston*, 23 Mo. 432; *Nations v. Pulse*, 175 Mo. 94. (4) No cause of action was stated against defendant Briggs. Every criticism and statement attributed to him was based upon the admitted fact that plaintiff was attempting to propagate the teachings of theosophy

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while holding a position in Drury College. These were the facts stated by defendant Briggs, which confessedly were true. Everything else attributed to said defendant were his deductions from these facts and his criticism of plaintiff on account thereof. *Cook v. Publishing Co.*, 241 Mo. 353; 25 Cyc. 401; *Cherry v. Des Moines Leader*, 54 L. R. A. 859. But a suit for libel against defendant Briggs, if well founded in the allegations of the petition, could not be joined with an action for breach of contract against his co-defendants, and the demurrer was properly sustained on that ground. *Cook v. Pub. Co.*, 241 Mo. 326; *Branch v. Knapp & Co.*, 222 Mo. 580; 25 Cyc. 401.

*V. O. Coltrane* for respondents George and Drury College.

FARIS, J.—Appeal from a judgment of the circuit court of Greene county, sustaining a demurrer to the following petition (caption omitted), to-wit:

“Plaintiff states that the defendant Drury College is a body politic and an educational institution and was organized July 2, 1873, under article 8 of chapter 37 of Wagner’s Statutes of Missouri.

“That under such original articles of incorporation and the by-laws governing the body, said Drury College was denominational in this: that the said articles and by-laws, amongst other things provided, that a majority of the board of trustees thereof provided for by such articles and by-laws must profess the faith and creed of the Christian organization known as the Congregational Church.

“That on the 8th day of May, 1905, the organization known as the Carnegie Foundation was organized and created under the laws of the State of New York.

“That by the charter of such organization and its by-laws, it is provided that any and all institutions of learning that do not provide for a prescribed re-

ligious test for its trustees, or for its faculty, or for its instructors, or for its students, are and become eligible to become the beneficiaries of the fund provided for by said Carnegie Foundation, and when the said institutions are, by and after proper application, placed upon the accepted list of said Carnegie Foundation, the professors thereof, as prescribed by the charter, by-laws, rules and regulations of said Carnegie Foundation, become eligible for retirement and become eligible to receive the benefits prescribed by said Carnegie Foundation.

“That the object of said Carnegie Foundation in providing such donations for the benefit of such educational institutions and for the teachers and professors thereof is to elevate the standard of such institutions and to elevate the standard of the teachers and professors thereof by insuring to said teachers and professors an income in the event of disability arising from years of service and to insure and encourage independence of thought.

“That prior to October 1, 1909, to-wit, on the — day of —, 1908, the said Drury College for the purpose of securing the benefits conferred by the said Carnegie Foundation amended its said charter and by-laws by striking from the said charter and by-laws the provision heretofore set forth touching the organization of its trustees. Plaintiff states that by the charter and laws of said college which were in force at all times hereinafter mentioned, it was further provided that ‘no religious or political test as a condition precedent to the enjoyment of all the advantages afforded by Drury College for study and instruction shall ever be established or allowed by the board of trustees.’

“That pursuant to said change in said articles said Drury College became eligible, and by application in due form prior to September, 1907, was placed upon the accepted list of said Carnegie Foundation, and by

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reason of the premises its teachers and professors were free from any political or religious test.

“Plaintiff states that by profession he is an educator and qualified himself for such profession and has devoted himself entirely to such profession since July, 1906, and was a teacher at all times herein mentioned.

“Plaintiff states that on or about the — day of September, 1907, the said Drury College named him as one of its faculty and retained him as a professor in Greek in said institution.

“Plaintiff states that by the terms of said employment he was engaged as member of said Drury College faculty for a period of one year, with the distinct promise and condition that if after said probationary period of one year there was no difficulty the said employment became permanent.

“Plaintiff states that the true meaning and intent of said engagement is that if the educational work of plaintiff was satisfactory and no personal objections could be urged that said employment would be permanent. But plaintiff says it was not contemplated that the question of the religious convictions and beliefs of plaintiff should be considered a ‘difficulty’ within the meaning of said employment, and that the failure to retain plaintiff as hereinafter set out and for the reasons hereinafter stated after he had passed said probationary period were breaches of said contract of employment, as plaintiff further states that in the notice of his engagement it was distinctly stated that he would become a permanent member of said faculty if his first year’s service as an educator were satisfactory.

“Plaintiff states that at said date and at all dates hereinafter mentioned he was a citizen of the United States and of the State of Missouri, that he was and is guaranteed religious freedom and the right of conscience and the right to worship according to the dic-

tates of his conscience as provided by the Constitution of said United States, Amendment Number One, and by the Constitution of the State of Missouri, article 2, section 5.

“Plaintiff states that at the dates hereinafter set forth there was in the said city of Springfield a public library, known as the Carnegie Library, and the same was and is maintained by general taxes levied upon the citizens of the said city of Springfield, Missouri, and is also partially maintained, so far as literature is concerned, by contributions of books and magazines by citizens generally.

“Plaintiff states that on January 18, 1898, he was and at all times since has been a member of the Universal Brotherhood and Theosophical Society, the principal purpose of which is to teach universal brotherhood, to demonstrate that such brotherhood is a fact in nature, and by its teachings to make such brotherhood a living power in the life of humanity; and the subsidiary purposes of which are the study of ancient and modern religious science, philosophy and art and to investigate the laws of nature and the divine powers in man.

“Plaintiff states that at all times hereinafter mentioned he was and is now a Mason and that at all times herein mentioned he followed the profession of teaching as a livelihood.

“Plaintiff states that at all times hereinafter mentioned the defendant J. H. George was and now is the president of the defendant Drury College.

“Plaintiff states that at all times hereinafter mentioned the defendant C. H. Briggs was and now is a minister of the Gospel, professing the Methodist faith, and at the times hereinafter mentioned was pastor of the St. Paul Methodist Episcopal Church in the city of Springfield, Missouri.

“Plaintiff states that on or about the — day of December, 1909, in the exercise of his rights, he

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caused to be tendered to the Carnegie Library a work, entitled the 'Key to Theosophy,' said work having been written to expound, interpret and elucidate the teachings of said Theosophical Society and Brotherhood.

"Plaintiff states that the defendants, C. H. Briggs and J. H. George and the said Drury College, through and by its board of trustees on the said --- day of December, 1909, knew that the plaintiff was a member of the said Theosophical Society and Brotherhood and for such reason determined to defame and injure plaintiff as a man and to destroy his influence as a teacher and to oust him from his position as a teacher in said Drury College and to drop him from the faculty of said college and to prevent his retention and employment as a member of said faculty.

"Plaintiff states that the defendants knew of the tender of said book, 'Key to Theosophy,' to said library, and with such knowledge and for the purposes aforesaid, and for the purpose of depriving plaintiff of his said constitutional rights and driving him from the said city of Springfield, Missouri, conspired and confederated to do the things hereinafter set forth and complained of:

"That is to say, they combined and confederated to interfere with his constitutional rights and to prevent him from enjoying the same; to represent him as a man morally unfit to be a teacher; to excite ill will and prejudice against him and thus affect his standing as a man and his position and standing as a teacher; to hold him up to ridicule and contempt; to securé his dismissal from Drury College and to prevent his retention as a member of its faculty and to prosecute and drive him from said city of Springfield and to injure him financially by urging his retirement from said faculty, and by lessening and affecting his opportunity for employment elsewhere as a teacher.



“Plaintiff states that in furtherance of said design and conspiracy, the defendant C. H. Briggs induced the librarian of said public library, who was then and there of said church of which defendant Briggs was pastor, to refuse to accept and receive said literature so tendered and induced said librarian to refuse to place on the same plane as other books in said library said ‘Key to Theosophy’ and other Theosophical books and magazines by plaintiff caused to be tendered.

“Plaintiff states that this was the first step of the defendant Briggs to humble and injure plaintiff, and that said Briggs caused the said librarian to discriminate against said literature and especially said book, ‘Key to Theosophy,’ on the alleged ground that said book was antagonistic to the teachings of the so-called Christianity of said Briggs and on the ground that it was not a proper book for the public mind.

“Whereas in truth and in fact all of the teachings of said book, ‘Key to Theosophy,’ tend to the uplifting of humanity and to the inculcation of morality and contains nothing that renders it unfit for reading and study.

“Plaintiff states that he directed the attention of the board of trustees of said library to said attempted discrimination and the said board of directors resolved that said book was a fit and proper work to be accepted and received and exposed for the use of the patrons of said library.

“Plaintiff states that thereupon and in furtherance of said design to deprive him of his said constitutional rights and to injure plaintiff in his character as a man and his standing as an educator, the said Briggs on the 12th day of March, 1910, falsely and maliciously represented and stated to the defendant J. H. George, who was then the president of said Drury College, that plaintiff ‘is an atheist and

unfit to be an instructor in said Drury College,' then and thereby charging, implying and intending to charge and imply that plaintiff as a so-called atheist was morally unfit to be an instructor.

"And said Briggs at said time demanded the retirement of plaintiff from said Drury College and threatened a boycott against said college by a body known as a Ministerial Alliance of Springfield, Missouri, thereby intending to threaten and thereby threatening that if plaintiff were retained by said Drury College the influence of said Ministerial Alliance would be exerted to injure said college financially by keeping students from entering said college and thereby intending to bring about the removal of plaintiff from the faculty of said college under threat of said boycott.

"Plaintiff states that said action was directed against him solely on account of his (plaintiff's) membership in said Theosophical Society and not on account of any lack of requirements demanded of him as a member of said Drury College faculty and not on account of any moral or mental delinquencies or deficiencies of plaintiff.

"Plaintiff states that it is not true that he (plaintiff) is an 'atheist,' as said defendant Briggs well knew, and plaintiff says it is not true that he was unfit to be an instructor in said college, as defendant Briggs well knew.

"Plaintiff states that after such attack, the said Briggs and the defendant J. H. George conspired and confederated to humiliate plaintiff, injure him as an educator and as a man and to force him to resign and retire from said faculty, and failing in which they conspired to secure a resolution of the board of trustees of said college to refuse to retain plaintiff as one of its faculty.

“Plaintiff states that in furtherance of said design and conspiracy, the defendant Briggs on Sunday, March 13, 1910, in and from the pulpit of the said St. Paul Methodist Episcopal Church in the city of Springfield, Missouri, in the presence and hearing of a large congregation of men and women, falsely and maliciously said and in a defamatory manner spoke of and concerning plaintiff certain false and defamatory words of the substance following, to-wit:

“‘The library has become the active agent and assistant of the evil one, his Satanic Majesty, because it has accepted a donation of a work from a scatter-brained professor who is a Theosophist,’ meaning thereby and intending to convey the meaning and being so understood by his auditors that the Carnegie Library aforesaid through the action of its board of directors had reported favorably upon the question of the character of the book, ‘Key to Theosophy,’ donated by plaintiff as aforesaid, and its acceptance by said board, and that by reason thereof the plaintiff was furthering and advancing evil; and meaning thereby and intending to convey the meaning thereby and thereby conveying the meaning and the meaning being so understood by his auditors that plaintiff was deficient and lacking in mental and moral attainments and was ‘scatter brained,’ and not fitted either mentally or morally to discharge the duties of his profession as a teacher and especially as a teacher and member of the faculty of Drury College.

“Plaintiff states that in furtherance of said design and as evidence thereof, the defendant George on the 15th day of March, 1910, thanked the defendant Briggs for the accusation made and lodged against plaintiff.

“Plaintiff states that in furtherance of said design to injure and punish him on account of his said religious convictions, and with the intention of discrediting him and forcing him to lose his said position

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as teacher, the said defendant Briggs on March 21, 1910, at a meeting of said Ministerial Alliance, it being a voluntary association of ministers of the Gospel in Springfield and composed of all denominations, spoke of plaintiff in the hearing and presence of divers persons, members of said Alliance, false and defamatory language of the substance following, to-wit:

“ ‘He,’ meaning plaintiff, ‘is an atheist and unfit to be an instructor,’ and at said meeting declared that ‘I (Briggs) have demanded of Dr. George, president of Drury College, action at the meeting of the board of trustees of said college for the retirement of Professor Darrow,’ thereby implying that plaintiff was unfit to be retained in the faculty of said college and intending to convey said meaning, and plaintiff states that the said statement was so understood by the auditors at said meeting.

“In furtherance of said design against plaintiff and as showing malice on the part of said conspirators, plaintiff states there was present at said last mentioned meeting one H. A. Schuder and the said Schuder attempted to declare and explain to the said Ministerial Alliance and those present that plaintiff was not an ‘atheist’ as declared by said Briggs, but the said Briggs interrupted the said Schuder and said declaration and refused to let the said Schuder proceed with his statement.

“Plaintiff states that said action and said statement was pursuant to and in execution of the agreement and understanding of said defendants Briggs and George and was intended and designed to influence said Ministerial Alliance and induce said association to take action as an association in a concerted demand on said Drury College for the retirement of the plaintiff and to afford said defendant George a pretended justification to bring the matter before the board of trustees of Drury College

and afford a pretended justification of the action of such board in retiring plaintiff from the faculty of said college.

“Plaintiff states that while said Ministerial Alliance as a body refused to lend itself to the designs of the defendants, yet as a result of the conspiracy of the defendants and said statements of defendant Briggs before said Alliance, the following appeared in the Springfield Republican, a newspaper published in Springfield, Missouri, on April 10, 1910, on the authority of the president of the Alliance, to-wit: ‘That while the individual members of the Alliance might have made such a request (viz.: a request on Dr. George and the trustees of Drury College at the instigation of defendants to remove plaintiff) the organization had not officially taken the matter up.’

“In furtherance of said conspiracy between said George and Briggs, and especially in furtherance of the design to dismiss plaintiff from his position as professor aforesaid, on account of his religious convictions, but at the same time intending to conceal the real reasons for such action and intending to find a pretext for such action, plaintiff states the following: That he was on April 6, 1910, a member of the College Discipline Committee of said Drury College, and a meeting of said committee, for the consideration of college matters of discipline, was called for said April 6th, and that said George, acting in concert with said Briggs for the purpose herein stated, notified all members of said committee of said meeting except this plaintiff, who at that time was at the chapel of the college in the discharge of his duties, as said George well knew; and plaintiff states that at said meeting so called the said George publicly complained of the nonattendance of plaintiff at said meeting.

“Plaintiff states that further in pursuance of said design to injure plaintiff and to punish him on account of his said religious convictions and with the

knowledge and approval of defendant George, the defendant Briggs on the 17th day of April, 1910, in the city of Springfield, Missouri, and from the pulpit of the said St. Paul Methodist Episcopal Church, South, and in the presence and hearing of divers persons, men and women, spoke of plaintiff false, defamatory and injurious language of the substance following:

“ ‘When a teacher eating the bread of a Christian institution teaches doctrine non-Christian and antagonistic to a personal God; when a man makes use of his position to spread his fad by attempting to proselyte and force his belief upon students, he is either weak here (the said Briggs at the word ‘here’ striking his head) or wrong here (the said Briggs at the word here, tapping his breast), weak-minded or morally dishonest. I say this man has either an ill-balanced intellect, or else is evil disposed. Such a man should be removed from his position. To him should be applied the words, ‘Fool, when wilt thou learn!’ ” the defendant Briggs thereby intending to convey the meaning and charging and thereby conveying the meaning and said meaning being so understood by the auditors, that plaintiff was improperly making use of his position as such teacher in Drury College and attempting to proselyte and attempting to force his belief upon students of said college, all of which was untrue in fact, as the defendants Briggs and George well knew, and intending to charge and to convey the meaning and the said auditors then understood the meaning to be that plaintiff was either weak-minded or morally dishonest and therefore an improper person to occupy the position of instructor of Drury College.

“And plaintiff says this was a part of the general plan of said Briggs and George to stir up such a sentiment as would apparently justify plaintiff’s removal as such instructor and with the design to

discredit plaintiff as a teacher and as a man and thereby injure his good name and deprive him of his means of livelihood.

"Plaintiff states that in furtherance of said conspiracy, the said Briggs and George caused said last described so-called sermon and remarks to be published on April 18, 1910, in the Springfield Leader, a newspaper published in Springfield, Missouri.

"Plaintiff states that on April 18, 1910, in furtherance of said design, said Briggs repeated to the said Ministerial Alliance the said language so used in said so-called sermon, he, Briggs, and said George intending and contriving to induce said Alliance to take part in the persecution of said plaintiff and to induce said Alliance to make demands on defendant George and on said Drury College for the removal or retirement of said plaintiff and thus afford an apparent justification for such action by said college, which course it had then determined upon pursuing.

"Plaintiff states that again on April 24, 1910, said Briggs in furtherance of said common design at the said church of which he was pastor preached another so-called sermon on the passage, 'Why do men not like to retain God in their thoughts?' 'If any man even an angel from heaven preach a different Gospel than this let him be accursed,' and made such pretended sermon a pretense for a covert assault upon this plaintiff.

"Plaintiff states that in answer to said repeated assaults, he, plaintiff, published an article in one of the papers of said city of Springfield, in which plaintiff quoted language used by said Briggs of the substance following: 'Rev. Mr. Briggs refers to me as a "scatter-brained" professor of Drury College and says when a man has his head turned by Theosophy he should not use his position as a teacher of Christian thought to form classes in Theosophy for the purpose of proselyting students to his fad.' Plaintiff

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states that in answer to said communication and with the knowledge and approval of the defendant George and in furtherance of said design to oppress and injure plaintiff the said defendant Briggs under his own signature and on April 19, 1910, caused to be published in the Springfield Leader, a newspaper published in the city of Springfield, Missouri, and having a large circulation in said city and throughout Southwest Missouri, an article containing the following language: 'The expression he (meaning plaintiff) professed to quote from me, "a scatter-brained professor of Drury College," was not used by me in the sermon preached March 12, 1910. I have never in any public utterance used the name "Drury College" in connection with this case. Further he charges that I said "when a man had his head turned by Theosophy he should not use his position as a teacher of Christian thought to form classes in Theosophy for the purpose of proselyting students to his fad."' He must be quoting from someone else, for I cannot recognize the quotation. He is about the last man in Springfield that I would speak of as a leader of Christian thought.'

"Plaintiff states that defendant Briggs in furtherance of said design and by said article and language reiterated that plaintiff was unfit mentally and morally to occupy the position of teacher and thereby charging by the negative pregnant denial that plaintiff is 'scatter-brained' and thereby admitting that he had used and reiterated said language without the use of the words Drury College, and thereby and by the use of said language reflecting upon the standing of plaintiff in Springfield, Missouri.

"Plaintiff further states that in furtherance of said design and intending to hold plaintiff up to contempt as an unfit associate of Masons and thereby intending to cause the removal of plaintiff as such teacher and intending to injure and oppress him on account of his religious convictions in said article of



April 19, 1910, used the following false and injurious language: 'I am sorry to learn he (meaning plaintiff) is a Mason, for Missouri Masonry has passed upon an issue which his case would bring up.' And in said article and for like purpose defendant used the following language: 'Masonry has no place for a man who does not believe in a personal God,' thereby not only improperly referring to Masonry, but implying and so charging the plaintiff an unfit person to be a member of said organization.

"Plaintiff further says that in furtherance of said design and intending to injure plaintiff in said profession, defendant Briggs in said article published the following language: 'I have nothing to do with the affairs of Drury College. Its curators must pass upon the fitness of men for places in its faculty, but as a Christian minister, I am unable to see how any manly man can eat the bread of a Christian college while seeking to undermine the foundation of Christian faith and substituting a fad worn out in India for the well-tried verities of Christian belief,' thereby in furtherance of said design charging plaintiff with being unmanly and with using his position as instructor in Drury College in an underhand and unmanly way and thereby charging plaintiff with violation of his duty to Drury College as said instructor. All of which is false in fact, and all of which was charged with the consent and approval of the defendant George, and with the intent of furnishing a pretext upon which the defendant Drury College could remove plaintiff and a pretext to not further retain him on its faculty on the pretended ground that it would injure said college to retain him.

"Plaintiff states that said defendants still conspiring to injure and defraud plaintiff, but at the same time fearful that their past conduct and declarations might involve said defendants Drury College and J. H. George, in the said Springfield Leader and

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in its issue of April 22, 1910, the defendant C. H. Briggs, with the knowledge and at the instigation of his co-defendants, published the following: 'As to my interview with Dr. George, March 12th, it never occurred to me to ask Dr. George to have Professor Darrow removed. All I said to him was it was taken for granted that Drury College would not retain in its faculty a champion of Theosophy any longer than was necessary. Further, I expressed to him the opinion that if Professor Darrow's connection with Drury College should cease with the current year, the ministers of the city would pass no criticism upon the college because of Professor Darrow's conduct. But I told him I had already heard enough to be sure for the college to appeal for patronage as a Christian college and yet continue a teacher of Theosophy in its faculty would awaken a storm of disapproval.'

"Plaintiff states that said article was intended and designed by defendants to furnish a pretext for the removal of plaintiff on the ground that Christian patronage would be withdrawn from said college if plaintiff were retained on its faculty.

"Plaintiff states that at said interview on March 12, 1910, as detailed by said Briggs in the said article of April 22, 1910, said Briggs expressed surprise to said defendant George that he, George, was not acquainted with the teachings of Theosophy as expounded in the book left by plaintiff as aforesaid in the Carnegie Library, and thereupon said Briggs left with the said defendant George garbled, mis-recited quotations from said work and purposely misrepresenting plaintiff as an atheist.

"Plaintiff states that said article was published in furtherance of said design to injure plaintiff and was intended as an appeal to the so-called Christian element of Springfield and vicinity to boycott said Drury College if said plaintiff were retained, and was published as an excuse and as a pretense for the

course already determined upon to dispense with the services of plaintiff as a member of said college faculty on account of his said religious convictions.

“And said garbled extracts from said Theosophical work was published for the express purpose of misrepresenting plaintiff as an atheist and for the express purpose and on understanding between defendants to injure plaintiff on such account.

“Plaintiff states that for the purpose of carrying out said conspiracy and arousing a sentiment against plaintiff if said Drury College should retain him, said Briggs, with the knowledge and consent of his co-defendants in said article of April 22nd, further stated: ‘If it (Drury College) asks support as a Christian college it will not carry a champion of Theosophy in its faculty one hour longer than it is compelled to, and these things are so plain to me that it never occurred to me to raise the question as to the stand the college will take in due time.’

“Plaintiff states that on April 29, 1910, in furtherance of said conspiracy to injure plaintiff and to retire him from the faculty of Drury College on account of his religious views, the said George removed plaintiff from the Bible School faculty of said college, upon which plaintiff held the position of professor of Biblical Greek, and assigned as a reason the said controversy with defendant Briggs and at the same time said George stated that plaintiff ought to resign from the faculty of Drury College unless in full sympathy with the Evangelical Christian Ideal.

“Plaintiff states as further steps in said conspiracy to injure plaintiff and to force his retirement on account of said religious views, the said defendant George on said April 29, 1910, and again on May 27, 1910, declared to plaintiff that no one not in full sympathy with Christian Orthodoxy ought to remain upon Drury’s faculty.

“Plaintiff states that by and through the machinations of defendants Briggs and George the said Drury College was prevailed upon to join said design to punish plaintiff on account of his religious views and to injure him in his standing as a man and teacher by removing him from its faculty, but said college, mindful of its charter and by-laws which prevented any religious test, and mindful of its membership in said Carnegie Foundation, and the benefits to be derived therefrom, conceived and advised the plan of retiring plaintiff under the plan of a pretended leave of absence.

“And by agreement between said defendants and for such purpose and to carry out such purpose, the defendant George in his own behalf and in behalf of Drury College proposed to plaintiff that the said college would grant plaintiff a leave of absence for a period of four months on full pay and proposed that at the end of said period plaintiff would voluntarily resign.

“For plaintiff states that during the said controversy and at the dates herein named he was a teacher under special contract expressed to be for one year and said period of four months remained of said period of employment.

“Plaintiff states said proposal was orally made to him by said defendant George, but plaintiff states that he refused the same, and as a part of the general plan to discredit plaintiff, the defendant George on June 4, 1910, in a communication given by way of an interview to a newspaper in said city of Springfield, first assumed and stated that plaintiff claimed he, plaintiff, had received a written proposition of such a leave of absence and then in said interview denied that any such proposal was made.

“Plaintiff says that in said interview defendant George charged plaintiff with having made untruthful statements, whereas in truth and in fact such pro-

posal was made and the said interview was had and is a part in the general design to injure and affect the standing of plaintiff and to hold him up to the people of Springfield as unworthy of their confidence and respect and as a man unfit to be an educator.

“Plaintiff states that when he declined said proposal to accept of said leave of absence and declined to voluntarily retire from the faculty of said college, and after said defendant had resorted to all of the aforesaid acts and statements to injure plaintiff, said defendant in furtherance of said common design hereinbefore described and in final consummation thereof removed the plaintiff from the faculty of Drury College.

“Plaintiff states that by the terms of his contract with said Drury College, as is the case of every member of the faculty, the period of his employment as teacher was indeterminate; that is to say, plaintiff was retained for the period of one year with the understanding and agreement that plaintiff would be retained at the discretion of the board of trustees for any period beyond said first year without any formal employment or renewal of said contract and said board by the articles and by-laws of said college could remove after said year any instructor when in the judgment of said board the interest of the college shall require it.

“Plaintiff states as aforesaid that after his refusal to retire, the said Drury College, in furtherance of the said designs and at the instigation of the said Briggs and George, and in final consummation of said conspiracy and intending likewise to humiliate plaintiff and intending to conceal as far as possible the true reasons actuating it, and acting upon a formal communication presented to it by the defendant George in which reference is made to the said controversy between plaintiff and defendant Briggs on the pretended ground that the usefulness of plaintiff

as a professor in said college had been impaired by such controversy, by an official vote and by order of record, refused to retain plaintiff as one of its faculty and addressed to plaintiff the following communication:

“ ‘At the annual meeting of the board of trustees yesterday, the following resolution offered by the committee on appointment of professors was adopted by the board: “Inasmuch as the articles of association of Drury College require of the trustees that they shall remove any instructor or officer when the interest of the college shall require it, we recommend that the secretary of the board should notify Professor Fritz S. Darrow that in the judgment of the board the interest of the college requires that his term of service should close September 1, 1910, and that he should understand that thereafter he will not be regarded as a member of the faculty.” ’ And plaintiff states that his official connection with Drury College thus and then ended.

“But plaintiff states that the facts stated in said communication are not true and that in truth and in fact the action of said board was the result of the conspiracy aforesaid to punish and injure plaintiff on account of his religious belief and convictions and that said conspiracy was formed, as alleged, by defendants to so injure the plaintiff and to destroy if possible his standing as a man and educator.

“And plaintiff states that the said Drury College through its said trustees had full knowledge of all the acts, statements and publications of the said Briggs and of the said George, its president, and in all things encouraged and finally ratified the acts of the said president.

“Pursuant to said conspiracy to injure and damage plaintiff and to prevent his re-employment as an educator and in execution thereof, plaintiff states that on the 10th day of July, 1910, as he had previously

done on a number of occasions in execution of said conspiracy, defendant Briggs declared that 'founders and believers in fads were frequently insane,' intending to charge and imply, and his auditors so understood the charge to be that plaintiff was insane as evidenced by his religious convictions.

"Plaintiff states that as a part of the conspiracy and in order to induce and prevail upon the plaintiff to resign from said faculty, the said George falsely represented and pretended that if plaintiff would resign that he, George, and the said Drury College would favor the adoption of resolutions which would fittingly express the worth of plaintiff as an educator and endorse him as a man and as an educator.

"But plaintiff says that after the forced retirement as aforesaid of plaintiff from the said faculty of Drury College, members of the said faculty proposed to adopt resolutions of appreciation of the work of plaintiff as one of their body and expressing regret and sorrow at plaintiff's retirement, but plaintiff says that in furtherance of said conspiracy to injure plaintiff, the defendant George frowned upon and through his influence as president of said college defeated the adoption of such resolutions.

"Plaintiff states that by reason of the premises his religion has been held up to ridicule and that he has been held up to ridicule and contempt and his feelings outraged; that he has been placed in a false position and his religion misrepresented and reviled; that he has been held forth to the people of Springfield, Missouri, and in all places where said papers circulate, as a teacher and defender of principles and views antagonistic to good morals, good government and Christian teaching; that he has been held forth and represented as unmanly and underhanded in his dealings with his fellow man; that he has been held forth unworthy to be a Mason or an educator and unworthy to be classed as either, and that said con-

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spiracy was designed and intended to affect and injure and the acts and declarations stated did and do affect and injure his reputation and standing as a man and educator; that by reason thereof he has been humiliated and embarrassed in his communication and intercourse with his fellow men and inquiries have been made by institutions of learning of said Drury College and have been ignored as a part of said conspiracy; that he has been ousted from his position as a member of the faculty of said Drury College and retired on charges so vague as to justify unfavorable inferences and demanding explanations whenever and wherever he seeks employment and inquiries have been made by reason of the vagueness of said order of dismissal and that by reason of the premises his standing as an educator has been injured and is injured and he has been compelled to expend large sums of money to employ counsel and has been compelled to expend large sums of money by reason of breaking up his residence in Springfield and being compelled to seek employment elsewhere.

"For all of which plaintiff claims he is damaged in the sum of fifty thousand dollars, for which sum, together with his costs, he prays judgment.

"FRITZ S. DARROW,

"By T. J. DELANEY, Counsel."

Each defendant filed a separate demurrer, setting up the same general grounds, which in substance were: (a) that the petition improperly joined two distinct causes of action, one in contract, the other in tort; (b) that said petition improperly joined several distinct causes of action in one count; (c) that there was a misjoinder of parties and of causes of action in the petition; and (d) because the petition did not state facts sufficient to constitute any cause of action against the defendants. This demurrer being sustained generally by the court as to each and all of the defendants, plaintiff declined to further plead, judg-



ment followed and the case is here upon the sole question of the goodness of the petition.

I. We have been compelled to set out the petition which has been attacked and the goodness of which on demurrer is the sole question to be decided on this appeal. We might well invoke the maxim *res ipsa loquitur*, and after directing specific attention to this petition, affirm this case, in the spirit in which a case was reversed by SHERWOOD, J., once on a time in a matter apposite here by analogy only. [Robinson v. Musser, 78 Mo. 153.]

II. Plaintiff in his brief says: "The dismissal of plaintiff without just cause, as it was, is a breach of such contract and would entitle plaintiff to recovery against Drury College." The petition of plaintiff upon the question of whether any action could possibly lie against Drury College for discharging plaintiff from his position therein as a teacher, says:

"Plaintiff states that by the terms of his contract with said Drury College, as is the case of every member of the faculty, the period of his employment as teacher was indeterminate; that is to say, plaintiff was retained for the period of one year with the understanding and agreement that plaintiff would be retained at the discretion of the board of trustees for any period beyond said first year without any formal employment or renewal of said contract and said board by the articles and by-laws of said college could remove after said year any instructor when in the judgment of said board the interest of the college shall require it."

It is manifest that under such a contract as plaintiff avers he had with Drury College the latter, through its trustees, was given a very broad discre-

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tion to remove the plaintiff from his position as a teacher in that school. This broad discretion is conferred and permission to so discharge him is given by the use of the words "when in the judgment of said board the interest of the college shall require it." [Brookfield v. Drury College, 139 Mo. App. 339.] If plaintiff (and he avers in his petition he did) suffered himself to be drawn into a controversy in the newspapers, in which such intemperate language as he sets out was used by him and by defendant Briggs toward each other, we are not able to say that the removal of plaintiff was an abuse of discretion in the board of trustees. While the petition of plaintiff avers the throwing off of sectarian religious suzerainty by Drury College, and by broad inference charges that it sacrificed its religious connections and convictions for a mess of Carnegie pottage, and while we must deem this true for the purposes of this demurrer, we are yet unable to conceive of the avowal by a college teacher of devotion to a cult such as Theosophy and a taking up in a newspaper controversy of the cudgels in defense thereof, being anything but hurtful to any college—Girard College not excepted. [See 26 Ency. Brit. 790—Theosophy.] We know, as every one else knows, that those standing *in loco parentis* to students select institutions of learning with some considerable thought of moral training and with some view to such a religious atmosphere as is common to, and not out of harmony with, some of the recognized religions of the Western Hemisphere. Can it be contended that if Drury College were to announce that one of its teachers was a believer in Buddhism, another a devotee of the creed of the Sun-worshippers, and still another a Mohammedan, that such beliefs and creeds, however popular in the Orient, where they originated, would popularize an institution of learning competing for the privilege of educating western youths? We

do not think there is any doubt that the voluntary acts of plaintiff, as he himself pleads them, of themselves furnished ample cause for his dismissal, and that Drury College violated no contract when it dismissed him. It is beside the question that he may have been dragged, or nagged, as counsel charge, into his unfortunate attitude by the officious intermeddling of a pragmatic zealot. We do not think that any cause of action was stated against Drury College.

III. It is fairly plain that the petition here seeks to charge a conspiracy on the part of the defendants **Conspiracy.** Briggs, George and others who are trustees of Drury College, to bring about the retirement of plaintiff as a teacher of said college. We have seen that the confessed acts of plaintiff considered, the board of trustees of this college had both ample power and legal provocation to discharge plaintiff from his office as teacher therein. In the absence of a statute forbidding conspiracies about a given subject-matter, no legally hurtful, and, *ergo*, no actionable conspiracy could be maintained by defendants toward plaintiff as to a thing which the board was justified in doing upon the facts here without a conspiracy. There are averments of fact as to alleged slanders and libels in the petition which might be sufficient if they were properly pleaded with a proper legal setting, to render defendant Briggs liable to be put upon his defense for actionable utterances. For Briggs, if the petition be true, and we are compelled to so regard it for the uses of this discussion, was guilty of a meddlesome and gratuitous intolerance touching the internal affairs of a school outside of his own church, which, to say the least, was never part or parcel of the example set by the meek and lowly Nazarene whom he professed to follow, and in whose vineyard he was working, and in whose footsteps he

ought to try to walk. But whether this is so or not we need not and do not now rule.

Be this as it may, the whole trend of all of the other allegations is that defendant George had neither part nor parcel in any such libels or slanders. In fact it is not contended by plaintiff that he took any physical part therein. But plaintiff seeks to render said George liable for these acts of defendant Briggs by a charge of conspiracy. It appears, however, by an averment further along in this petition that "the said Briggs on the 12th day of March, 1910, falsely and maliciously represented and stated to the defendant J. H. George, who was then the president of said Drury College, that plaintiff 'is an atheist and unfit to be an instructor in said Drury College,' then and thereby charging, implying and intending to charge and imply that plaintiff as a so-called atheist was morally unfit to be an instructor. And said Briggs at said time demanded the retirement of plaintiff from said Drury College and threatened a boycott against said college by a body known as the Ministerial Alliance of Springfield." It will be seen that the pleader, after charging a combine and confederation between defendants George and Briggs, here charges Briggs as acting alone and as communicating certain facts to George touching plaintiff's alleged unfitness to be an instructor in said college, and as urging upon George the discharge of plaintiff. Such an averment is of course rankly inconsistent with plaintiff's theory of an actionable conspiracy.

The appellant very seriously contends that learned counsel for defendants have utterly misapprehended his position and his petition. This position, as we gather it from his brief, is that he is not suing for libel or slander, or for a breach of contract, but that his pleading is intended in effect to perform the office of the old action on the case for conspiracy. This position he thus states in his brief:

“As is plainly indicated it is a suit bottomed on an alleged conspiracy which involved breach of contract and slander and libel as means of accomplishment.”

Let us examine whether this position is tenable. An inspection of the petition discloses that defendant George is not charged personally with issuing libels or uttering slanders against plaintiff. The gravamen is that Briggs slandered and libelled the plaintiff in pursuance of an alleged conspiracy between George and Briggs. The animus alleged may be read between the lines. No actual malice toward the plaintiff is charged. But the animus of Briggs we thus infer is due to the frenzy of over-zeal; that of George, to protect and subserve the interests of his school.

Returning to the strict letter of the petition and viewing it and weighing it as an action on the case for conspiracy, we find that in such an action the rule was stated in the very early case of *Hunt v. Simonds*, 19 Mo. l. c. 588, thus:

“In a civil action on the case for a conspiracy, the gist of the action is the damage which the plaintiff has sustained by the acts of the defendants, and the allegation of a conspiracy need not be proved. [1 Saund. 230, note 4; *Savile v. Roberts*, 1 Ld. Raym. 378; *Sheple & Warner v. Page*, 12 Vt. l. c. 533.] In *Hutchins v. Hutchins*, 7 Hill, l. c. 107, it is said: ‘The conspiracy or combination is nothing, so far as sustaining the action goes; the foundation of it being the actual damage done to the party.’ It is upon this ground only that those cases rest, which allow a recovery against one defendant when the others are acquitted.

“As it is the settled law that, in an action on the case in the nature of a writ of conspiracy, the plaintiff may have judgment against one defendant, although he may have no cause of action against the others, we are assisted in determining the character

of the case which will support such action; and the conclusion would seem to be unavoidable, that the action can only be sustained against several, where the acts complained of would sustain an action against one of the defendants; in other words, that the number of the defendants sued, and the allegation that they conspired together, do not authorize the plaintiff to maintain his action, when he could not maintain it against one defendant, if sued alone. In *Wellington v. Small*, 3 Cush. l. c. 150, it is said by the Supreme Court of Massachusetts, 'As to the first of these averments (that there was a conspiracy), it may be remarked that, if an act is done by one alone, which is no cause of action, a like act is not rendered actionable by being done in pursuance of a conspiracy. In an action on the case in the nature of a conspiracy, the gist of the action is not the conspiracy (as it is in an indictment, and was in the old writ of conspiracy), but the damage done to the plaintiff.' The only use in charging the conspiracy is, to make the defendants responsible for the acts of each other, done in pursuance of the common design."

But it is clear from the authorities, and the *Hunt* case, *supra*, so holds, that the invocation of the rules as to actions on the case for conspiracy does not relieve plaintiff from the duty of stating a cause of action against Briggs, one of the alleged conspiring tortfeasors. For, says the above excerpt, "The conclusion would seem to be unavoidable that the action can only be sustained against several where the acts complained of would sustain an action against one of the defendants; in other words, that the number of the defendants sued, and *the allegation that they conspired together do not authorize the plaintiff to maintain his action when he could not maintain it against one defendant, if sued alone.*" (Italics are ours.) This is apparently in line with the holdings of all jurisdictions. [*DeWulf v. Dix*, 110 Iowa, 553;

Kimball v. Harman, 34 Md. 407; Boston v. Simmons, 150 Mass. 461; Bohn Mfg. Co. v. Hollis, 54 Minn. 223; Martens v. Reilly, 109 Wis. 464; Adler v. Fenton, 24 How. 407.] And the reason for the rule, to-wit, that (absent a statute otherwise providing) *a conspiracy of itself furnishes no cause of action, because from the mere forming of it, no possible damages can accrue*, is not far to seek.

Judged by this rule the petition here is bad. It charges libels published and slanders uttered at divers times to different audiences, and to different readers through different media and under different circumstances, all tangled, mixed and blended in one count. This is bad pleading. [Flowers v. Smith, 214 Mo. l. c. 129; Michael v. Matheis, 77 Mo. App. l. c. 562.] Besides, this petition violates the statutory rule which requires "a plain and concise statement of the facts constituting a cause of action" (Sec. 1794, R. S. 1909), and while conceding that this defect is not one for which by the strict letter of the statute (Sec. 1800, R. S. 1909), a demurrer will lie, yet it has been said that "the pleader is not allowed now, any more than formerly, by inserting doubtful or uncertain allegations in a pleading, to throw upon his adversary the hazard of correctly interpreting its meaning." [Sidway v. Live Stock Co., 163 Mo. l. c. 373.]

Considered from any angle we are convinced that the petition is bad on demurrer; that it is incoherent and presents no tangible or understandable issues; that it is "without form, and void" (Genesis 1:2), and violates almost every known rule of good pleading and that the judgment sustaining a demurrer to it was just and right and ought to be affirmed. Let this be done.

*Walker, P. J., and Brown, J., concur.*

JONATHAN HARTMAN v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Division Two, July 14, 1914.

1. **NEGLIGENCE: Imputed or Inferential: Facts and Circumstances.** Where all the facts connected with an accident fail to point to the negligence of the defendant as the proximate cause of the accident, but show a state of affairs where an inference could be as reasonably drawn that the accident was due to a cause or causes other than the negligent act of the defendant, then the plaintiff cannot rely upon mere proof of the surrounding facts and circumstances of the accident, and the defendant is not called upon to explain the cause of the accident and to purge himself of the imputed or inferential negligence.
2. **———: ———: ———: Leaning from Engine: Bent Handhold: Contributory Negligence.** The plaintiff, a fireman in defendant's employ, advanced to the opening between the cab and the tender while the engine was running and, reaching, but not looking, for the handholds on cab and tender, leaned out. He missed a handhold, fell and was injured. The handhold on the tender, five feet long, was bent in near the middle in such manner that, instead of being three inches throughout from the tender wall, it varied from an inch and a half to three inches. *Held*, that plaintiff's own evidence shows that he was guilty of contributory negligence, and a peremptory instruction to find for defendant should have been given.

Appeal from Livingston Circuit Court.—*Hon. Arch. Davis*, Judge.

REVERSED.

*O. M. Spencer, Frank Sheetz, John C. Carr and M. G. Roberts* for appellant.

(1) Defendant's instruction in the nature of a demurrer to the evidence should have been given for the reason that the plaintiff's admitted neglect to use the handhold, free from all defects, on the cab side,



contributed as a proximate cause to his fall and subsequent injury. 20 Am. & Eng. Ency. Law (2 Ed.), p. 140; 26 Cyc. 1247; McGinty v. Waterman, 93 Minn. 242, 3 Am. & Eng. Ann. Cases, 41; Walter v. Wire Co., 14 Mo. App. 592; Gribben v. Mining Co., 142 Cal. 248; Munn v. Wolff Mfg. Co., 94 Ill. App. 122; Cogan v. Burnham, 175 Mass. 391; Hart v. Light Co., 201 Pa. 234; Piper v. Iron Co., 78 Md. 249; McGoldrick v. Metcalf, 144 N. Y. 630. (2) Courts are not required to stultify themselves by giving credence to testimony palpably untrue and contrary to physical facts and common sense. Nugent v. Milling Co., 131 Mo. 252; Spiro v. Transit Co., 102 Mo. App. 263; DeMaet v. Storage & Packing Co., 121 Mo. App. 104; Hook v. Railroad, 162 Mo. 581; Payne v. Railroad, 136 Mo. 580; Phippin v. Railroad, 196 Mo. 321; Kelsay v. Railroad, 129 Mo. 375; Fellenz v. Railroad, 106 Mo. App. 161; Barrie v. Railroad, 102 Mo. App. 91; Ferguson & Wheeler v. Trans. Co., 79 Mo. App. 361; Elliott on Railroads (2 Ed.), sec. 1703; 1 Moore on Facts, sec. 148, p. 193; Hayden v. Railroad, 124 Mo. 566; Hugart v. Railroad, 134 Mo. 680. (3) The demurrer to the evidence should have been sustained because: The plaintiff in choosing knowingly and unnecessarily to look ahead by swinging his body out from the rapidly moving engine (a dangerous and unsafe position) instead of occupying the seat within the cab to look out of the window (a safe place) but for which he would not have fallen from the engine, was guilty of negligence as a matter of law barring recovery. This legal conclusion of negligence *per se* could not be excused, palliated or justified by proof that other firemen, even to defendant's knowledge, had been habitually guilty of similar negligent acts, that is, that they, too, left the safe place provided for them and knowingly chose a more dangerous way to look ahead. Such similar negligent custom practiced by others, even to defendant's knowledge, could not impart the qualities of due

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care to an act of plaintiff, which the law declares negligence barring a recovery. The fact that other firemen, to defendant's knowledge, refused to use the places provided for them, and knowingly chose to experiment with death and danger by taking more dangerous positions to look ahead, does not change the rules of law concerning negligence precluding a recovery for so doing. Proof of similar negligent acts habitually by other firemen did not excuse the plaintiff for such evidence of custom is never admissible if the plaintiff's act is itself negligent. *Chaney v. Railroad*, 176 Mo. 603; *Lenk v. Coal Co.*, 80 Mo. App. 380; *Smith v. Box Co.*, 193 Mo. 737; *Moore v. Railroad*, 146 Mo. 582; *Montgomery v. Railroad*, 109 Mo. App. 94; *Hirsch v. Bread Co.*, 150 Mo. App. 174; *Watson v. Coal Co.*, 52 Mo. App. 366; *Railroad v. Coal Co.*, 52 Mo. App. 366; *Railroad v. Kane*, 118 Fed. (C. C. A.) 223; *Martenson v. Railroad*, 60 Iowa, 705; *Railroad v. Schumacher*, 152 U. S. 78; *Railroad v. Jones*, 95 U. S. 439; *Railroad v. Tindall*, 57 Kas. 719; *Powers v. Railroad*, 56 N. E. 710.

*Burns, Burns & Burns* for respondent.

In the case at bar plaintiff was doing precisely what he had done for nine and a half years and what the other servants of defendant had been habitually doing for twenty-two years at least, and without any accident as far the evidence shows. If the course adopted was not reasonably safe defendant could and would have shown that fact but it offered no evidence on that point. If the custom prevailed for a long time for firemen to use the handholds on the tender and cab to look ahead to view the track or to get air and so long that the defendant with reasonable care would have known it then the defendant is held as a matter of law to know that the plaintiff would do just as he

did in this case. Crawford v. Stock Yards Co., 215 Mo. 394; Finnegan v. Railroad, 244 Mo. 608. In the case at bar the act of going to the opening of the gangway between the cab and tender was not negligence *per se*. The custom was observed for at least twenty-two years, without accident or injury resulting, down to the time this defective handhold was provided by the defendant. The evidence on that point is undisputed and after a searching cross-examination by defendant's counsel not a syllable was elicited tending to show that what plaintiff did was not reasonably safe if the engine had not been defective. The contention that the court should have sustained a demurrer at the close of plaintiff's case is without merit. Riley v. O'Kelley, 250 Mo. 647; McGee v. Railroad, 214 Mo. 530; Riggs v. Railroad, 216 Mo. 304; Merritt v. Matchett, 135 Mo. App. 176; Barr v. Martin, 170 Mo. App. 399.

ROY, C.—Suit for damages for personal injuries in which plaintiff had a verdict and judgment for \$18,000, from which defendant appeals.

Plaintiff had been in the service of the defendant as fireman nearly ten years, sometimes acting as engineer. On the morning of April 18, 1910, he was fireman on train No. 55, known as the "Chicago and Missouri Limited." At Cameron there was a change of engines caused by the fact that the one previously used was disabled. The substituted engine was No. 2164. The gangway on that engine is eighteen or twenty inches wide. There is a handhold, a perpendicular iron rod, on each side of the entrance to the gangway from the outside, on both sides of the engine. The handhold on the corner of the tank is about five feet long, and extends from about a foot below the floor of the gangway to four feet above it. These handholds were fixed to the tank with bolts, so that, in their ordinary position, they were about three inches

from the walls of the tank and cab. The one on the left side of the tank was bent so that at a point sixteen inches from the top it was an inch and a half from the tank, and sloped from that point above and below, and being three inches from the tank at a point two inches below the top. The handhold on the left side of the cab was in its ordinary condition. The fireman's seat was on the left side of the cab, which had the usual windows.

The evidence for the plaintiff, introduced over the objections of defendant, showed that it had been the custom, for many years, of firemen in defendant's employ to step to the opening in the gangway to look ahead and to get air, supporting themselves by taking hold of the handholds. The injury occurred about a half mile west of Lathrop while the train was going about thirty-five miles an hour.

On direct examination the plaintiff gave his knowledge of the accident as follows:

"By Mr. Burns: When you step to the gangway to look ahead or to get air or for any purpose, in looking out, how do you support yourself? A. By taking hold of these two handholds. . . .

"Q. How far from Lathrop was it you stepped to the gangway? A. I think it was about a half a mile west of Lathrop.

"Q. When you stepped to the gangway, for what purpose did you step there? A. Well, it starts to make a curve there, and they have to look ahead.

"Q. What did you do when you stepped to the gangway? A. I reached for those handholds.

"Q. Did you get hold of them? A. No, sir.

"Q. Do you know anything about any subsequent happenings? When do you remember anything afterward? A. I don't remember anything then. I remember reaching for the handhold and missing it, and don't remember anything further."

On cross-examination he testified as follows:

"Q. Was there a handhold on the back of the cab, extending out into the gangway on the fireman's side on engine 2164 that morning? A. I never looked; I don't know whether there was or not.

"Q. You mean to tell the jury that you don't know whether that handhold was there or not? A. No, sir.

"Q. You don't know whether there was a handhold over there (indicating) or not? A. No, sir.

"Q. On direct examination you mentioned the fact that as you went to the gangway you reached for the handholds? What were you talking about? A. That handhold that shows there, and the one that should have been on the tank.

"Q. Did you see either of them? A. No, sir.

"Q. How did you know where they were, if you didn't see them. A. Because its customary for them to be right there.

"Q. Your eyesight was good that morning? A. Yes, sir.

"Q. You mean to tell the jury you didn't see the handhold on either the front of the tender or back of the cab that morning? A. Yes, sir.

"Q. How could you reach for them, if you didn't know either of them was there? A. Because they ought to have been there.

"Q. If this had been there on the back of the cab, you would have got it, wouldn't you? A. I think I would.

"Q. If it was there? A. I think I would.

"Q. Did you reach for this one (indicating)? A. Yes, sir.

"Q. In going out to the edge of the gangway, I will call your attention to this open space in here. In going out to look out of the gangway, what has been your custom with reference to getting hold of this handhold here? A. I take hold of both of them. I

come up quickly and catch them handholds and stop here.

"Q. You wouldn't depend on this handhold here?

A. Yes, sir; I would; I would take both.

"Q. Would you think it safe to depend on this alone? A. No, sir; not when the train is running.

"Q. You must get hold with the right hand, then?

A. It is a good idea to get hold with both.

"Q. If the train is going fast and you get hold of this handhold on the tank with the left hand, would it have a tendency to throw you out? A. It would have a tendency to throw a man out whichever one he got hold of, if he didn't get but the one.

"Q. Regardless of the way the train was going?

A. Yes, sir."

Plaintiff did not know the bent condition of the handhold. He was severely cut and bruised about the face, several teeth were knocked out, and he suffered a slight curvature of the spine. There were several broken ribs. An abscess formed and broke several times in his bowels. His injuries are permanent.

At the close of all the evidence the defendant asked an instruction in the nature of a demurrer to the evidence, which was refused.

The peremptory instruction to find for the defendant should have been given. In our opinion the

plaintiff, as shown by his own evidence, was guilty of contributory negligence and cannot recover. Many cases have been cited by counsel on both sides. None of

them approximate this case. This is not a case in which the handhold gave way by reason of a defect, and thus let the plaintiff fall. There were the usual handholds strong enough for their intended purpose. One of them was bent out of its usual line an inch and a half at the point of the greatest departure. There is no proof in the case that it was the custom of the firemen to lean out of the gangway without first mak-

Negligence:  
Contributory:  
Facts and  
Circumstances.

ing sure of their grasp on the handholds. There is no showing that the plaintiff ever did such a thing but the one unfortunate time. There is no evidence to the effect that firemen become so skilled in leaning from the gangway that they are able, while in the act of placing their bodies beyond the point of equilibrium, to safely catch the handholds without looking or feeling for them. We do not believe that such a thing could be safely done, nor that a man of ordinary prudence would attempt it. Shall we assume without proof that the plaintiff was able to do that?—and shall we further draw the unreasonable conclusion that he missed both handholds because one of them was bent towards the tank as stated?

In *McGrath v. Transit Co.*, 197 Mo. 1. c. 104, GRAVES, J., said: "Where all the facts connected with the accident fail to point to the negligence of the defendant as the proximate cause of the accident, but show a state of affairs where an inference could be as reasonably drawn that the accident was due to a cause or causes other than the negligent act of the defendant, then the plaintiff cannot rely upon mere proof of the surrounding facts and circumstances of the accident, and the defendant is not called upon to explain the cause of the accident, and to purge himself of the imputed or inferential negligence."

The judgment is reversed. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All the judges concur.

**WILLIAM T. MCGINNIS, Appellant, v. HY-  
DRAULIC PRESS BRICK COMPANY.**

Division Two, July 14, 1914.

1. **NEGLIGENCE: Master and Servant: Insurer of Safety.** An employer is not an insurer of the safety of an employee while on his premises. Nor is the conduct of the master's business to be subjected to the shifting rules of alleged safety arbitrarily devised and set up to fit the actionable necessities of of every casualty.
2. ———: ———: **Mud Scraper.** In front of defendant's office was a mud scraper, intended to be used by persons entering the building in scraping mud from their shoes. To a board ten inches wide, driven into the ground, was attached at the top with bolts a piece of sheet iron, which had been bent over until it was only about four inches above the pavement, and extending outwardly from the board about three inches. Plaintiff, an employee, who had been at the office only a few times in the course of four months, went to the office for instructions as to his work, and as he came down the steps and turned towards one of defendant's wagons his right foot caught under the projecting iron of the mud scraper, and he was thereby thrown to the ground, and his wrists badly injured. The time was 7:30 in the morning, early in October, and the day was bright. He did not see the scraper, nor did he look for it. *Held*, that he was guilty of contributory negligence, as a matter of law, and cannot recover damages.
3. ———: ———: ———: **Rule of Care.** The same rule of care applies to an employee who goes to his master's office for instructions about his work as would apply if he were actually at work there. All the duties the master owes him while on the premises attach at the moment of his injury; and that duty is to provide him a reasonably safe way of ingress and egress; and it is likewise the reciprocal duty of the servant to use his senses to see an appliance plainly in sight which the master had the right to install; and if, in broad daylight, he fails to see a permanent appliance, in plain view, located where the master had a right to place it, he is guilty of contributory negligence.

Appeal from St. Louis City Circuit Court.—*Hon. Leo  
S. Rassieur*, Judge.



AFFIRMED.

*Kinealy & Kinealy* for appellant.

(1) The mud scraper, by reason of its character, location and condition, was an obstruction dangerous to persons leaving defendant's building, and the duty of the master to exercise ordinary care to furnish his servant a reasonably safe place to work extends to exits and ingresses and to all places where he properly resorts on the premises in connection with his employment. *Schumacher v. Breweries Co.*, 247 Mo. 141; *Strobel v. Manufacturing Co.*, 148 Mo. App. 22; *Dressers on Employers' Liability*, sec. 13, pp. 75-6; 4 *Labbatt's Master & Servant*, sec. 1558, note 2; *Alexander v. St. Joseph*, 170 Mo. App. 376. (2) Plaintiff did not know of the obstruction, but even if he did he could not be held guilty of contributory negligence as a matter of law merely because his foot caught under the bent-over scraper. *Graney v. St. Louis*, 141 Mo. 180; *O'Donnell v. Hammond*, 144 Mo. App. 155. (3) A peremptory instruction such as was given in this case is never proper where the facts are in dispute or where the facts being undisputed, they are such as to be susceptible of two inferences, one consistent with ordinary care and the other tending to show negligence, thus leaving ground for difference between fair-minded men as to whether or not negligence or contributory negligence exists. *Clubb v. Scullin*, 235 Mo. 585; *Williamson v. Transit Co.*, 202 Mo. 345; *Hegberg v. Railroad*, 164 Mo. App. 514.

*Garner W. Penney* and *Percy Werner* for respondent.

(1) The servant is chargeable with knowledge of all conditions surrounding his employment, and of risks created by these conditions, according as it may

reasonably be inferred that those conditions or those risks would have been comprehended by a person of ordinary prudence whose mental and physical capacities, both natural and acquired, and opportunities for observing the facts indicative of danger, were the same. 1 Labatt's Master & Servant, sec. 391, p. 1028. If the risk is such as to be perfectly obvious to the sense of any man, whether master or servant, then even in the case of defective machinery, the servant assumes the risk. Keegan v. Kavanaugh, 63 Mo. 230; Soller v. Shoe Co., 130 Mo. App. 721; Jones v. Cooperage Co., 134 Mo. App. 330; Pohlman v. Car & Foundry Co., 123 Mo. App. 228. (2) Plaintiff, as servant of the defendant, was bound to inform himself as to his surroundings and is held, as a matter of law, to have known and accepted all the risks of the premises which were open and obvious to the sense of any man. (a) This has been applied to overhead dangers, as where a railroad brakeman ran into an overhead bridge, or a driver drove under a low gateway. Devitt v. Railroad, 50 Mo. 302; Baker v. Asphalt Pav. Co., 92 Fed. 117; Carroll v. Boston Coal Co., 81 N. E. 296. (b) The same is true as to dangers underfoot, such as risers between a hallway and a room. Ware v. Evangelical Baptist, etc., Assn., 63 N. E. 885. (3) There is no question for a jury here. No jury would have a right to set up a standard which would, in effect, dictate the customs of a community. The matter of what kind of mudscrapers, and where to place them, is a matter for the judgment and discretion and good taste of the owner of the premises. One jury might thoroughly approve of the arrangement; another disapprove. Juries might differ as might individuals. But that would not affect the right of the owner of the premises to use his own judgment and discretion. It is not pretended that the owner set a trap. Questions which are legitimately engineering or architectural questions cannot

be submitted to the jury as legal questions. *Railroad v. Driscoll*, 176 Ill. 334; *Railroad v. Riley*, 145 Fed. 137; *Gilbert v. Railroad*, 128 Fed. 531; *Morris v. Railroad*, 108 Fed. 748; *Minnier v. Railroad*, 167 Mo. 120; *Boyd v. Harris*, 176 Pa. 484; *Marshall Field & Co. v. Leo Gosky*, 133 Ill. App. 316; *Larkin v. O'Neill*, 119 N. Y. 221; *McIntire v. White*, 171 Mass. 170. The master is always presumed to have done his duty, and he is furthermore within the protection of the rule that "the extent of his legal obligation is merely to provide instrumentalities that can be used without any abnormal danger by a servant who uses ordinary care." 1 *Labatt, Master & Servant*, p. 73; *Wheat v. St. Louis*, 179 Mo. 572; *Coffey v. Carthage*, 186 Mo. 585; *Strutt v. Railroad*, 18 App. Div. (N. Y.) 134. (4) The charge of negligence, that the mud scraper was allowed to become bent over, should be disregarded, because the stumbling over the mud guard is itself a sufficient, certain and operating cause of the fall, and no other explanation is needed. *Taylor v. Yonkers*, 105 N. Y. 202; *Wharton's Negligence*, sec. 85.

FARIS, J.—Action for personal injuries, tried in the circuit court of the city of St. Louis. At the close of the plaintiff's evidence the court *nisi* instructed the jury that upon the proof adduced plaintiff was not entitled to recover. Thereupon plaintiff took an involuntary nonsuit with leave to move to set same aside. Thereafter, his motion to set aside this nonsuit being by the court overruled, he appealed.

The negligence pleaded is that which the courts, for convenience, have denominated common-law negligence as distinguished from negligence bottomed upon the violation of a statute or an ordinance. The injuries accrued to plaintiff from his having tripped upon a mud scraper, and having been thereby thrown with considerable violence to the brick pavement, sustaining in his fall injuries to the wrists of both hands.

This mud scraper was maintained outside of the entrance to the office of defendant. The specific elements of the negligence alleged by plaintiff and on which he bottoms his right to recover, are thus succinctly stated by him in his petition:

"1. In placing and maintaining the mud scraper, by which plaintiff was caused to fall, of the size and character and in the location above stated.

"2. In permitting the iron portion of said scraper to become bent over as stated and in permitting same to remain in that condition.

"3. In failing to furnish plaintiff a reasonably safe place to pass in and out of said building in the course of his employment, because of the presence of said mud scraper as then and there maintained by defendant."

The answer was (1) a general denial; (2) a plea of assumption of risk, and (3) contributory negligence of the plaintiff.

The *locus in quo* is graphically shown by the picture on the following page.

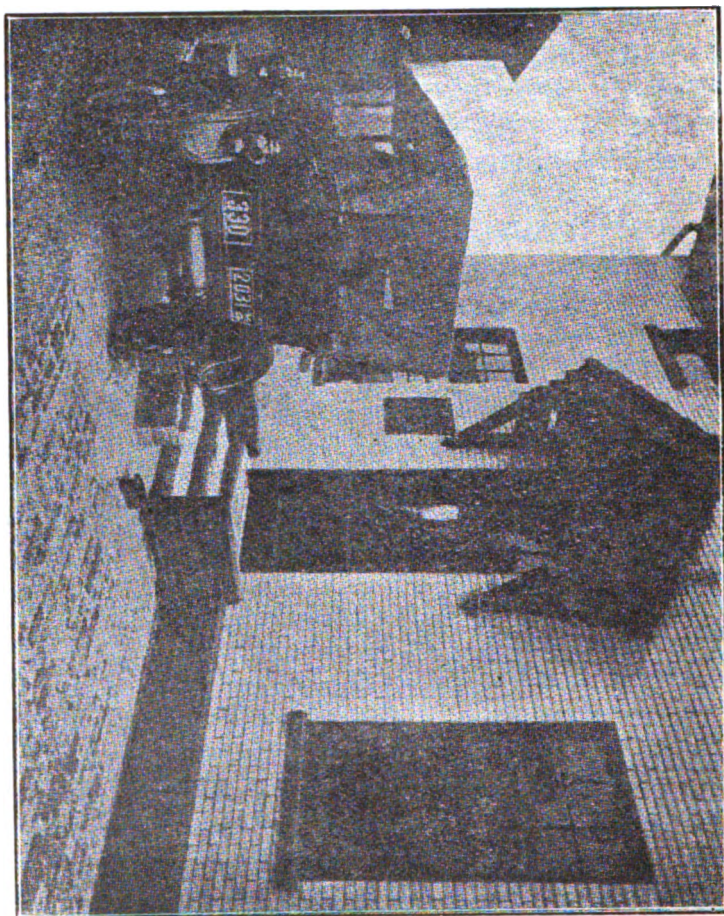


EXHIBIT NO. 2.

Plaintiff asked for \$15,000 as damages; hence our jurisdiction. The salient substantive facts as shown by the evidence of the plaintiff (defendant, of course, put in none) are fairly set out by plaintiff, who, in fairness to himself, we permit to speak for himself; adopting as ours his statement of the facts, with minor emendations:

Defendant's office building was situated on defendant's premises on the west side of Kingshighway between the tracks of the Missouri Pacific and the Frisco railroads. Kingshighway ran north and south and at the time of the injury to plaintiff, October 7, 1910, a viaduct was being constructed along Kingshighway, across the railroad tracks, and in front of defendant's premises. The office building in question was of brick and the main line of it was eight feet west of and parallel with the west line of Kingshighway. In other words, the building sat eight feet back from the property line. In front of defendant's building all the way out to where the construction work was going on, about twenty-six feet, there was a uniform pavement of brick, without any curbing or breaks. This building was constructed with rooms on either side of a central hall. The entrance to the building was by three or four steps, and on either side of the approach to these steps there was a mud scraper, intended for use of persons entering the building in scraping the mud from their shoes. These mud scrapers, one upon the north and one upon the south of the entrance, were about seven feet apart and were about ten inches long and stood at right angles to the line of the lowest step and about two feet in front of, that is, east of it, and were entirely surrounded by the brick-paved space. Each scraper consisted of an oak plank ten inches wide by one and five-eighths inches thick inserted in the ground with its width running east and west, the eastern edge of the scraper being three feet, eight and one-half inches west of the wes-

tern line of Kingshighway. The top of the wooden post stood five inches above the ground and to this post there was bolted a piece of sheet iron ten inches long and three-sixteenths of an inch thick, which stood, when in its upright position, about two and one-fourth inches above the wood. For some two weeks or more prior to the 7th of October, 1910, the iron portion of the northernmost scraper had been bent down towards the south so that it stood horizontally about four inches above the pavement and extending three-eighths inches southwardly from the wooden post to which it was fastened. Plaintiff was an employee of the defendant, whose duties, amongst other things, it was to go to different localities in the city where defendant was delivering brick for paving purposes and to there receipt for the brick as it was delivered by the wagons. On the day before his injury, he had been receiving brick at a locality on Penrose street, and had been instructed by his immediate superior to call up the office to ascertain what job he was to go to the next day. This the plaintiff tried to do, but did not succeed in getting connection with the office by 'phone, and so on the next morning, having plenty of time, he went down to the office building in question to see Mr. Pleasant, the shipping clerk, from whom he was to receive the instructions as to where to go to work. This was a new building, about four or five months old, and Mr. McGinnis had been in it about three or four times prior to the occasion in question. He went into the building about seven o'clock in the morning and got his instructions from Mr. Pleasant and then went out of the building to go to the locality where he was to work. As he came out the door at about 7:30 o'clock, on what plaintiff says he "supposes was a bright morning, maybe a little cloudy," he noticed that between the building and a hole in the street where the viaduct work was going on, a distance of about twenty-six feet, a wagon was standing from which lumber was being

## McGinnis v. Press Brick Co.

unloaded, and driving north just in front of the building and within about two feet and a half of the lowest step was one of defendant's loaded brick wagons. Mr. McGinnis's destination from the building was toward the north along Kingshighway, and as he came out of the building and down the steps he saw that there was room for him to pass between the steps and the wagon driving north, but as he started northwardly his right foot caught under the horizontally projecting iron portion of the northernmost mud scraper, causing him to fall forward to the street, whereby his wrists were badly hurt and he suffered the injuries for which he here sues. He was unable to arise, but was helped up by some men who saw him fall, and was sent by defendant to a doctor and thence to his home. As stated, plaintiff had been in this building three or four times before, but had not, he swears, noticed these mud scrapers. One witness testified that about two weeks before the plaintiff's injury witness had heard defendant's superintendent tell one of its employees to straighten up this bent-over mud scraper.

The sole point to be ruled is the correctness of the trial court's action in instructing the jury to find for defendant at the close of plaintiff's evidence. In other words, upon the facts shown, should the case have gone to the jury? If a case was made by plaintiff, we should reverse; if not, we must affirm.

Negligence:  
Master and  
Servant:  
Demurrer to  
Evidence.

Plaintiff had been employed by defendant some several years. But the office building of defendant had been in use by it only some four or five months prior to the casualty by which plaintiff was injured. He had been in this building only some two or three or four times before this—he tells us he does not remember definitely the number of times. He was hurt about 7:30 o'clock in the morning, in the early part of October, in broad daylight, and on a bright day,



plaintiff "supposes, though it may have been a little cloudy;" of this he is not sure.

The mud scraper which caused plaintiff's hurt was ten inches long, eight and one-half inches high originally, but bent down to five inches when plaintiff was hurt. It was on a board set into the brick pavement, with which this part of defendant's premises was paved. This board was originally one and five-eighths inches thick, but since the iron scraping part was bent down, the whole scraper when plaintiff got his hurt, looked at from above, was nearly five inches wide on top. It was placed on the premises of defendant, inferably as an appliance of cleanliness. To be of use in the intended behalf, it must then needs be about, or near, the entrance to defendant's office; a foot or mud scraper for the feet of entrants to the office would obviously subserve no scintilla of its intended office if located at a window, or in the rear yard, or upon the fire escape.

Obviously, regard being had to the testimony of plaintiff, that he never saw either of the mud scrapers till he tripped and fell over the north one, it can make no difference whether the iron part of this scraper was bent down or not. Its condition in this behalf had nothing to do with the injury to plaintiff, so far as the finite mind can see. If he had known it was there, from having theretofore observed it and so knowing its location assumed its being in repair, and had, so assuming, been injured from its being out of repair, there would be something in this contention. As the facts are we drop out of our discussion the physical condition of disrepair of the scraper, and come to look to the only remaining debatably tenable contention that the maintenance of it at all, in the place it was set, was a negligent act.

It is said in 3 Labatt's Master and Servant, sec. 935, that: "An employer has a right to arrange his

own premises in any way which suits his convenience." [Anthony v. Leeret, 105 N. Y. 591.]

It is reasonably plain that any other rule would in actual practice have the effect of making an employer an insurer of the safety of an employee. This for the reason, that the conduct of the master's business would otherwise be subjected to shifting rules of alleged safety arbitrarily devised and set up to fit the actionable necessities of every casualty and such shifting, arbitrary methods, however incongruous, would be urged as being the only safe method and only sane way of arranging and conducting the master's business.

We do not understand counsel for defendant to contravene the rule contended for by plaintiff that the same rule of law applied to plaintiff in going to and returning from the premises of defendant as protected him while on such premises and just as if plaintiff had actually been engaged there at work. Upon the facts before us no other view is tenable. All the duties which the master owed to plaintiff while the latter was upon the premises attached at the moment plaintiff was injured. [Jackson v. Butler, 249 Mo. 342; Lewis v. Railroad, 59 Mo. 495; Porter v. Railroad, 71 Mo. 66; Huhn v. Railroad, 92 Mo. 440; Alcorn v. Railroad, 108 Mo. 81; Williams v. Railroad, 119 Mo. 316.] At this precise moment it was incumbent on the defendant to furnish to plaintiff, who was on the premises in the line of duty, a reasonably safe way of ingress and egress. Reciprocally it was the duty of appellant to use his senses as to an appliance plainly in sight, which appliance respondent had the right to install and touching which, as we have seen, no duty lay upon the master to place at any location other than that which was convenient to, and suited the master.

We think upon the facts here the plaintiff was guilty of contributory negligence as a matter of law in failing to see in the light he had and under the

circumstances here, the mud scraper by which he was injured. For it was the duty of the plaintiff himself to exercise ordinary care for his own safety; to use his eyes, which he says were reasonably good, and to avoid running into permanent erections and appliances, plainly visible and open, upon his employer's premises.

It is true that plaintiff denies absolutely that he ever saw the scrapers, or either of them until he was hurt. But does it materially aid his case that in broad daylight, in an open and otherwise clear space, he failed to observe a fixed and permanent appliance, which was in plain view and was practically as big in bulk and presented to the vision an object as large as one of the volumes of the Revised Statutes? We think not. Negligence, and likewise contributory negligence, may and oftentimes does, consist as well in failing to know as in failing to do. For says Labatt: "The juridical theory of imputed knowledge, which is applied in actions by a servant against his employer, is simply this: that he is or is not chargeable with a comprehension of the conditions which caused his injury and of the risks created by those conditions, according as it may reasonably be inferred that those conditions or those risks would or would not have been comprehended by a person of ordinary prudence, whose mental and physical capacities, both natural and acquired, and opportunities for observing the facts indicative of danger, were the same as those of the servant himself." [4 Labatt's M. & S., sec. 1310; Porter v. Hannibal & St. Joe Railroad Co., 71 Mo. l. c. 77; Hollenbeck v. Railroad, 141 Mo. 97; Nicholds v. Plate Glass Co., 126 Mo. l. c. 64.]

In the case of Porter v. Railroad, *supra*, at page 77, it was said:

"If, however, the defect is patent, open to observation, or such as the ordinary use of the machine in the business the servant is engaged in would disclose

to an ordinarily observant man operating it, and the servant had ample opportunity, by operating it, before being injured, to observe the defect, his opportunity to know would be held as knowledge, whether in fact he knew of the defect or not. [Keegan v. Kavanaugh, 62 Mo. 230; Hulett v. St. L., K. C. & N. Ry. Co., 67 Mo. 239.]”

Commenting upon the entire trend and scope of the hundreds of cases cited by him on this point, the above distinguished author says:

“It will be seen that the general effect of these cases is that an adult servant of ordinary intelligence is presumed to have been capable of ascertaining every fact which could have been apprehended by the senses of a person having the same opportunities as he had for exercising those senses in relation to the dangerous conditions which caused the injury.” [4 Labatt’s Master & Servant, sec. 1313, and numerous cases cited.]

No case holding to the contrary has been called to our attention. The cases of Alexander v. St. Joseph, 170 Mo. App. 376; Graney v. St. Louis, 141 Mo. 180, and O’Donnell v. Hannibal, 144 Mo. App. 155, are all sidewalk cases, wherein injuries occurred to pedestrians upon public streets and sidewalks. We need scarcely pause to say that there is a difference between the actual degree of care reciprocally enjoined by law upon a city as to its sidewalks and pedestrians thereon, as compared to that required of a master and his servants while the latter are at work upon the master’s premises. In the former case there is an implied assurance that the sidewalks are clear and unencumbered and reasonably safe and free from dangerous obstructions, and reasonably safe for the use of pedestrians, for which use alone they are maintained; while on the other hand obviously, no business could ordinarily be carried on, for neither machinery, machines, materials and appliances could be installed or used upon the master’s premises, if an assurance

of absolute freedom from obstructions and smoothness of way were warranted to the servant by the master. Such cases are not so in point here as to be decisive, however much in point upon a different state of facts, and however similarly we may loosely define generally the degrees of care respectively enjoined.

The case of *Strobel v. Mfg. Co.*, 148 Mo. App. 22, cited by appellant, while superficially seeming to be controlling as to the facts, is yet not so. For the reason, that in the *Strobel* case, *supra*, the obstruction was abnormal or unusual, was in a dark passageway used by the employees as a means of exit, and was composed of material loosely and carelessly, but temporarily, piled therein. It was an obstruction which lacked the feature of permanence; it was therefore abnormal, i. e., "not conforming to system" (*Webster's Dictionary*), and rendered the passageway dangerous beyond the ordinary at the time of the injury to *Strobel*, and an injury occurring therefrom was therefore actionable.

It results from what has been said that the judgment should be affirmed. Let this be done.

*Walker, P. J., and Brown, J., concur.*

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THE STATE v. EMPIRE BOTTLING COMPANY,  
Appellant.

Division Two, July 14, 1914.

**NONALCOHOLIC DRINKS: Adulteration: Saccharin: Constitutional Question.** The statute (Laws 1911, p. 261) prohibiting the making or selling of nonalcoholic drinks adulterated with saccharin is unconstitutional. Whether saccharin is deleterious to health or not, it is an arbitrary discrimination to prohibit its use in nonalcoholic drinks and not in other foods and drinks. If the Legislature intended to prevent the use of saccharin in nonalcoholic drinks, not because it is deleterious, but because it sweetens, then there is an arbitrary discrim-

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State v. Bottling Co.

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ination in favor of those who sweeten such drinks with sugar. If the Legislature regarded saccharin as deleterious to health, it should have excluded it from all foods and drinks, and not merely from nonalcoholic drinks. If the purpose was merely to prevent the sweetening of nonalcoholic drinks, it should have prohibited the use of any kind of sweetening in such drinks.

Appeal from St. Louis Court of Criminal Correction.—  
*Hon. Calvin N. Miller, Judge.*

REVERSED.

*Schnurmacher & Rassieur* for appellant.

(1) The act is a special law, although a general law might have been made applicable, and it therefore violates subdivision 32 of section 35 of article 4 of the Constitution of Missouri. In so far as the said act prohibits the use of saccharin in non-alcoholic drinks, without at the same time prohibiting the use of saccharin in alcoholic and other drinks and foods, the act is class legislation and violates subdivision 26 of section 53 of article 4 of the Constitution of Missouri, in that it grants a special or exclusive right, privilege or immunity to other corporations, associations or individuals, and unlawfully discriminates against the defendant. And the said act also violates section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it unlawfully abridges the privileges and immunities of this defendant and denies to this defendant the equal protection of the laws. *State v. Miksicek*, 225 Mo. 572; *Woolley v. Mears*, 226 Mo. 41; *State ex rel. v. Ashbrook*, 154 Mo. 375; *State v. Walsh*, 136 Mo. 405; *State v. Thomas*, 138 Mo. 100.

(2) Even if the act be held constitutional in every respect, yet, in no event can there be a conviction of defendant without proof that saccharin is injurious to health and therefore that the soda water was adulterated.

*John T. Barker*, Attorney-General, and *W. T. Rutherford*, Assistant Attorney-General, for the State.

(1) The act applies to all manufacturers and persons offering for sale soda water containing saccharin, and is, therefore, not open to the objection of being class legislation. *State ex inf. v. Oil Co.*, 218 Mo. 368; *State v. Webber*, 214 Mo. 277; *State v. Grossman*, 214 Mo. 240; *State v. Railroad*, 239 Mo. 233; *Railroad v. Arkansas*, 219 U. S. 466. (2) It was within the legislative function in the enactment of this statute for the preservation of health to insist that nonalcoholic drinks should not have saccharin as an ingredient. *St. Louis v. Schuler*, 190 Mo. 531; *St. Louis v. Polinsky*, 190 Mo. 520. (3) All questions concerning the justice, reasonableness, wisdom or policy of statutes must be left to the Legislature, and therewith the courts are in nowise concerned. 1 *Lewis's Sutherland*, Stat. Constr., secs. 85, 366; *Tel. Co. v. Manning*, 186 U. S. 238; *Hannibal v. Marion Co.*, 69 Mo. 571; *People v. Railroad*, 23 Barb. 138; *Railroad v. Little*, 45 Ga. 388; *Burlington v. Dey*, 82 Iowa, 312; *Plank Road v. Harrison*, 16 Ill. 81; *Jamison v. Gas Co.*, 128 Ind. 555; *Ins. Co. v. Commonwealth*, 133 Mass. 161; *State v. Swaggerty*, 203 Mo. 527; *Railroad v. United States*, 220 U. S. 575; *Thornley v. U. S.*, 113 U. S. 313; *U. S. v. Chase*, 135 U. S. 262; *Plessy v. Ferguson*, 163 U. S. 558; *Hawaii, Mankichi*, 190 U. S. 247; *Bank v. Parker*, 192 U. S. 80; *New Jersey v. Anderson*, 203 U. S. 490; *Railroad v. Cotton Oil Co.*, 204 U. S. 447; *Railroad v. Arkansas*, 219 U. S. 465.

ROY, C.—This is a prosecution under the Act of April 7, 1911 (Laws 1911, page 261), prohibiting the adulteration of non-alcoholic drinks by the use of saccharin and other substances therein named. Defendant was convicted and has appealed. It is

**Adulteration of  
Nonalcoholic  
Drinks:  
Saccharin:  
Unconstitutional  
Statute.**

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charged in the information that defendant sold "an article of food, ready for consumption, being a non-alcoholic drink, to-wit, soda water, which was then and there filled into a bottle containing about one pint, and which was then and there adulterated in this, to-wit, by having a foreign substance added thereto, to-wit, saccharin."

Defendant moved to quash the indictment because that part of the act prohibiting the use of saccharin is not within the title of the act, and is, therefore, contrary to section 28 of article 4 of our State Constitution, and also because the act is class legislation contrary to subdivision 26 of section 52 of article 4 of that Constitution, and also because it abridges the privileges and immunities of this defendant and denies to this defendant the equal protection of the laws, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States. The motion was overruled.

At the trial defendant admitted that it sold to one Frank Mantz for fifteen cents a bottle of soda water containing one pint, said soda water being a non-alcoholic drink, an article of food ready for consumption. H. E. Wiedemann, a chemist, witness for the State, testified that he analyzed the soda water furnished him by Mantz and found that the soda water in the bottle contained 0.0229 of one gram of saccharin.

At the close of the State's case, defendant's counsel asked for its discharge on the State's testimony, which motion was overruled. Defendant then proceeded to introduce its evidence, and the following occurred:

"Mr. Rassieur: I desire to introduce a copy of the report of the Remsen Referee Board, which I have with me here, as published by the Government. It was transmitted March 6, 1911, to the Secretary of Agriculture by Ira Remsen, Chairman of the Board. I offer only the report and not all the exhibits that go with



the report; I also offer the supplementary report of January 13, 1912; and also the opinion of Frank McVeagh, Secretary of the Treasury and a member of the Pure Food Board of the United States.

"Mr. Leahy: I object to the offer of these documents in evidence for the reason that they are incompetent, irrelevant and immaterial, because the law of this State absolutely prohibits the use of saccharin in non-alcoholic drinks. I might also object on the ground that these documents are merely opinions of persons, not sworn and not before the court, but I do not want to put defendant to the expense of bringing these witnesses, therefore I do not object to the evidence on that ground.

"The Court: Upon what theory do you offer that evidence, Mr. Rassieur?

"Mr. Rassieur: On the theory that if the court finds that saccharin, when used in quantities such as the witness testified to as used in this case, the court will say that saccharin used in such a quantity is not and cannot be regarded as injurious, and that therefore there was no adulteration, and a statute which undertakes to make that illegal and forbids the use of that which is harmless is unconstitutional.

"The Court: The objection to the evidence offered by the defendant will be sustained.

"To which ruling of the court defendant then and there by counsel duly excepted and still excepts."

Said report contained the following: "The conclusions reached as a result of the investigations are given in detail in the separate reports herewith presented, together with all of the data upon which these conclusions are based. The main general conclusions reached by the referee board are as follows:

"(1). Saccharin in small quantities (0.3 gram per day or less) added to the food is without deleterious or poisonous action and is not injurious to the health

of normal adults, so far as is ascertainable by available methods of study.

“(2). Saccharin in large quantities (over 0.3 gram per day and especially above 1 gram daily) added to the food, if taken for considerable periods of time, especially after months, is liable to induce disturbances of digestion.”

And also the following: “As a result Messrs. Hamilton and Hough have submitted briefs; these briefs have been submitted to Dr. H. W. Wiley, Dr. W. G. Bigelow and Dr. Kebler, of the Bureau of Chemistry, Department of Agriculture, and to Solicitor McCabe and Assistant Solicitor W. P. Jones, of that department; and these five gentlemen have submitted statements—all favoring the prohibition of saccharin—and Messrs. Hamilton and Hough have replied. And the full discussion is now before us in the printed record. The three secretaries, at the hearing on November 22d, asked the attorneys to incorporate in their briefs the proposal of a method to admit the use of saccharin in foods under conditions and restrictions that would limit its possible daily consumption within the limits of positive harmlessness indicated by the referee board, to-wit: 0.3 gram per day; and this proposal has been submitted in definite form. And it seems to be plain—or at least most probable—that the limit of one one-hundredth of one per cent of saccharin in foods would bring the use of saccharin within the limits of positive harmlessness indicated by the referee board. But the calculation on which this is based should be further tested before adoption.”

According to the proffered evidence one would need to drink about thirteen pints of the defendant's soda water in twenty-four hours before he would get to the danger point in the use of saccharin. If such is the case, the amount of saccharin in defendant's soda water is not deleterious to health, for we cannot

imagine one so addicted to its use as to consume that much. But, independent of the question as to whether such use of saccharin is deleterious, we think that the statute is an arbitrary discrimination against the makers of soda water. It may be taken for granted that saccharin is or may be used in foods and drinks which are non-alcoholic. Whether it is deleterious to health or not, it is certainly an arbitrary distinction to prohibit the use of saccharin in non-alcoholic drinks and not prohibit its use in other foods and drinks. If it is deleterious to health in one case, it would be so in the other. If it was the purpose of the Legislature to prevent the use of saccharin in soda water, not because saccharin is deleterious, but because it sweetens the soda water, then it is an arbitrary discrimination in favor of those who sweeten soda water with sugar. If the Legislature regarded saccharin as deleterious to health, it should have excluded it from all foods and drinks and not merely from non-alcoholic drinks. If the purpose was merely to prevent the sweetening of non-alcoholic drinks, it should have prohibited the use of any kind of sweetening in such drinks.

We regard this as too plain a case for a long citation of authorities. It falls clearly within the principles enunciated in *State v. Miksicek*, 225 Mo. 561, l. c. 572.

The judgment is reversed and the defendant discharged. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

**DALE E. BARTHEL et al., Appellants, v. JESSE D. ENGLE.**

Division Two, July 14, 1914.

**SPECIFIC PERFORMANCE:** Sale by Heirs: One Heir Willing to Sell. Evidence showing merely that one of several heirs was conducting negotiations looking to a sale of land held in common, and was willing that it should be sold if the others agreed, does not warrant a decree of specific performance for his share.

Appeal from Dallas Circuit Court.—*Hon. C. H. Skinker*, Judge.

**REVERSED AND REMANDED** (*with directions*).

*James H. Richardson, W. N. Finley and Fyke & Snider* for appellants.

The court erred in rendering judgment in favor of defendant for a one-fifth interest in the land because there was no evidence to support such judgment and because it is outside the issues raised by the pleadings. *Ford v. Gebhardt*, 114 Mo. 298; *Hill v. Mining Co.*, 119 Mo. 27; *Blaine v. Knapp*, 140 Mo. 251; *Gibson v. Cranage*, 39 Mich. 49; *Zaliski v. Clark*, 44 Conn. 218; *Printing Co. v. Thorpe*, 36 Fed. 414; *Walker v. Auto Co.*, 124 Mo. App. 636; 36 Cyc. 789.

*John S. Haymes, O. H. Scott and Levi Engle* for respondent.

The court properly rendered judgment for defendant for one-fifth of the land; for where a party contracts to sell more than he has, the purchaser is entitled to the performance to the extent of the interest of the party contracting. *Lucket v. Williamson*, 31 Mo.

58; McGhee v. Bell, 170 Mo. 132; Lamyon v. Chesney, 186 Mo. 556; Bales v. Roberts, 189 Mo. 66.

WILLIAMS, C.—This is an action in ejectment to recover possession of one hundred and sixty acres of land in Dallas county, Missouri. One Harmon Barthel, grandfather of plaintiffs, died about 1892, seized of the fee simple title to the land in question and left surviving him as his sole and only heirs his widow, four sons and three grandchildren. The widow died in 1907. The three grandchildren are the plaintiffs in this suit and are the only children of one of the sons of said Harmon Barthel, said son having died a short time before the death of said Harmon Barthel. The four sons of Harmon Barthel who survived him were Alvin W., Herman J. C., Julius H., and Oscar H., none of whom are parties to this suit. On April 12, 1910, the above-named grandchildren obtained, by quitclaim deed, all the right, title and interest of the other above-named heirs in and to this land. The evidence on the part of plaintiffs further tended to show that in August, 1910, one of the plaintiffs, then living in Illinois, made a trip to Dallas county, Missouri, on behalf of himself and his sisters, to see the land, and found the defendant in possession of the same. The witness asked defendant why he was in possession of the land and the defendant replied that he had the right of possession by reason of a contract to purchase. Defendant refused the request to show said contract. Demand for peaceable possession was thereupon made but defendant refused to give up possession and thereafter this suit was instituted.

The petition in this case was in the usual form. The answer, after admitting possession in the defendant, pleaded a general denial. The answer further alleged that defendant entered into a contract with the plaintiffs and the other above-named heirs by which they agreed to sell said land for a consideration of

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\$1600 and that defendant was in possession of said land under and by virtue of said contract of purchase; that defendant ever since the making of said contract was ready and willing to pay said purchase price upon the delivery to him of proper deeds, conveying the legal title of said property to him; the answer further alleged that Alvin W., Herman J. C., Julius H., and Oscar H. Barthel undertook, by a quitclaim deed dated April 12, 1910, to convey their interest in said land to plaintiffs, and that plaintiffs, at and prior to said date, knew of defendant's aforesaid contract for the purchase of said land. The prayer was for specific performance of said contract.

The evidence on the part of defendant was to the following effect: On July 18, 1909, Herman J. C. Barthel, residing in Illinois, then the owner of an interest in said land, by reason of being one of the heirs of said Harmon Barthel, deceased, wrote a letter to Mr. N. Finley, of Cloverdale, Missouri, in which he stated: "The place is for sale. Do you think you could find a buyer for it? If there is any one that wants to buy the place let me know and I will see that I or one of the heirs will be there to sell it." Mr. Finley thereupon saw the defendant and defendant made an offer of \$1500 for the land. Finley wrote to Herman Barthel concerning defendant's offer. In replying to this letter, Herman Barthel wrote Finley, under date of November 29, 1909, in part as follows: "Received your letter a few days ago and was glad to hear from you. In regard to the farm you said the man offered \$1500—Fifteen Hundred Dollars for the place, but you think you can get \$1800 or \$1850; well then I had better put the price \$2000 and if you can't get that you can shade it \$100 to \$150 to make it the \$1850, which you say you think you can get."

After this Finley again saw the defendant and defendant made an offer of \$1600 for the place and Finley submitted this offer by letter to the said Herman

Barthel. In this last letter Finley enclosed a blank deed containing a correct description of the land. On December 27, 1909, Herman again wrote Finley, in part as follows: "Received your letter a few days ago and was glad to hear from you. Must have been delayed some as it has sometime since it was wrote. Will hear from the other heirs in a week or ten days and can tell if the offer is all O. K. to them, if so, will have the papers drawn up but think ought to have \$1700 any-way to leave us out." On January 17, 1910, Herman again wrote to said Finley, in part as follows:

"Mr. Finley if that offer is good yet on the farm let me know by return mail. It takes quite a while to get mail this winter as the R. R. are blocked so much. The heirs are all willing to sell I think; there is one that I haven't heard from yet; he is in Minn. some place and can't get him located as yet but hope to in a few days and as soon as we or I do I will turn the matter over to my brother Alvin S. Barthel, at Milledgeville, Ill., and he can tend to it better and quicker than I can as I am quite a ways from the P. O. and when you write me again I will let him know right away what you said in your letter and I will send the papers to him today what you sent to me."

Finley thereupon wrote Herman that the offer was still good. Witness Finley further testified that after that time he received another letter from Herman Barthel but that the letter had become lost or destroyed. Upon proper showing the court permitted the witness to testify to what was said in this lost letter and Mr. Finley testified that Herman Barthel in his letter said: "Us four are willing to take the bid," or "Us four are will to take the \$1600 for the land." The witness testified further concerning the contents of this lost letter as follows: "He said his brother in Minnesota wrote and it was all O. K. and they would take the \$1600 for the farm. He said he had heard from his brother in Minnesota; that he had wrote to

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him; and they was all willing to sell and they would accept the proposition." And further: "He was hunting the heirs up and he said that four of them was willing to sell for that."

The defendant testified that he saw this letter which was afterwards lost and that in that letter Herman wrote: "I got a letter from my brother in Minnesota and he is willing to accept the offer of \$1600 for the land." Defendant further testified in this regard: "He said he would hurry the matter up as fast as he could as the heirs were scattered around. He said he would hurry the matter up as fast as he could and get them to sign the deed."

The defendant further testified that after seeing this letter he "supposed they was going to send the deed" and that in March thereafter he took possession of the land. There was evidence tending to show that the rental value of the farm was about \$40 per year. The court found in favor of plaintiffs for a four-fifths interest in the land and for \$35 damages, finding that the rental value of their interest in the land was three dollars per month. The remainder of the decree is somewhat indefinite and uncertain in meaning, but it undertakes to decree the title of a one-fifth interest, being the interest formerly owned by Herman J. C. Barthel, out of plaintiffs and to vest the same in defendant and that defendant be required to pay into court \$320 for said interest. Plaintiffs duly perfected an appeal to this court.

Appellants contend that the court erred in rendering judgment in favor of defendant for a one-fifth interest in the land, because there was no evidence to support the same.

The law with reference to the rights of a *vendor* to have a contract for the sale of the land specifically performed is that he must have all the title he contracts to sell before he can insist upon the enforcement of the same, or

Specific  
Performance.



in other words, it must be enforced as an "entirety," if at all, and not by "piecemeal." [Luckett v. Williamson, 31 Mo. 54, l. c. 58; Hill v. Rich Hill Coal Mining Company, 119 Mo. 9, l. c. 27, and authorities therein cited.] But with reference to the *purchaser* the situation appears to be different and the general rule is that where the vendor does not have title to all the land which he contracts to sell, the purchaser, if he so desires, "can insist on having all the vendor can convey with a compensation (or abatement of the purchase price) for the difference." (Parentheses ours.) [Luckett v. Williamson, *supra*, l. c. 58; McGhee v. Bell, 170 Mo. 121; Bales v. Roberts, 189 Mo. 49, l. c. 66; 2 Story, Eq. Juris. (13 Ed.), sec. 779.]

Respondent, relying upon the line of cases last above cited, contends that while the evidence fails to

show that Herman J. C. Barthel had authority to contract for the sale of the interest of the other heirs in said land, yet the contract was valid as to his one-

**Negotiations  
for Sale by Heirs:  
One Willing to  
Sell: No Contract.**

fifth interest and that therefore the defendant was properly allowed to have the contract enforced with reference to said one-fifth interest. The defect in this contention is that it assumes, as existing, that which did not exist, to-wit, proof of an unequivocal agreement upon the part of said Herman J. C. Barthel to convey all or any part of said land. The evidence does show that he, as *one* of the heirs, was willing to sell the land for the price offered, and that he was corresponding with some of the other heirs trying to get their consent to the sale. In one of the letters he said, "I *think*" all the heirs are willing to sell. Later he wrote that *four* of the heirs were willing to sell. It appears from the evidence that at that time there were *seven* heirs, each owning an interest in the land. It clearly appears from the correspondence that his consent to sell was conditional upon all the heirs agreeing to the sale. In one of the letters he says: "Will hear from the

other heirs in a week or ten days and can tell if the offer is all O. K. to them, *if so*, will have the papers drawn." At most the correspondence shows nothing more than negotiations upon his part attempting to bring about a sale by getting the consent of the other heirs and nowhere does it appear in the correspondence that he *agrees*, or *undertakes to obligate himself*, either individually, or jointly with the other heirs, to sell the land. The evidence therefore shows the absence of a concluded agreement to sell and hence the absence of the right of specific performance. Discussing a very analogous situation, Judge BRACE, in the case of *Ford v. Gebhardt*, 114 Mo. 298, l. c. 306, said:

"In order to entitle the plaintiff to the relief sought in this case it devolved upon him to show a contract actually concluded between him and Gebhardt and Somerville for the purchase of the land in question. 'If what passed between them was but treaty or negotiation, or an expectation of contract, . . . no specific performance can be had.' [Fry on Specific Performance of Contracts, sec. 264.] And if it be doubtful whether the contract was concluded or the negotiation still remained open, specific performance will be refused. [Fry on Specific Performance of Contracts, sec. 269.] As was said by FOSTER, J., in *Lyman v. Robinson*, 14 Allen, 254: 'Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. The question in such cases always is, did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound.' "

It follows that the court erred in decreeing that the title to one-fifth of said land be divested out of plaintiffs and vested in the defendant. Other questions are presented by the record but the above point

is decisive of the case and renders unnecessary further discussion.

The judgment is reversed and the cause remanded with directions to the circuit court to have such further proceedings in the cause as shall become necessary to ascertain and determine the outstanding matter of rents and profits for the whole of the tract and upon the determination of that matter to enter judgment against the defendant and in favor of plaintiffs for the possession of the entire tract of land described in the petition and for such amount of damages as the court may find. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

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### THE STATE, Appellant, v. W. A. LONG.

Division Two, July 14, 1914.

1. **DEALING IN OPTIONS: Sec. 4781, R. S. 1909: Repeal of Statutes.** Section 4781, R. S. 1909, a part of the law against option dealing enacted in 1889, was not repealed by the enactment in 1907 of Sec. 4776, a part of the bucket-shop law. The sections have distinct offices to perform, and the enactment of the one had no effect upon the other.
2. ———: **Sec. 4782, R. S. 1909: Repeal of Statutes.** Section 4782, R. S. 1909, prohibiting the keeping of a place for option dealing, being practically the same as Sec. 3 of the bucket-shop law of 1887, the former superseded the latter, and the express repeal of Sec. 3 in 1903 did not operate as a repeal of Sec. 4782.
3. ———: **Statutes: Constitutional.** Sections 4780, 4781 and 4782, R. S. 1909, prohibiting dealing in options or the keeping of a place for that purpose, are constitutional.

Appeal from Randolph Circuit Court.—*Hon. James D. Barnett*, Judge.

**REVERSED AND REMANDED.**

*John T. Barker*, Attorney-General, *Ernest A. Green*, Assistant Attorney-General, and *Jerry M. Jeffries* for the State.

Repeals by implication are not favored and both sections are permitted to stand if it can be done on any reasonable construction, and it is the duty of the court to harmonize them if possible. *State ex rel. v. Amick*, 247 Mo. 271; *State ex rel. v. Brodie*, 161 Mo. App. 538; *Decker v. Diemer*, 229 Mo. 296; *St. Louis v. Kellman*, 235 Mo. 687; *State v. Bratzer*, 245 Mo. 499.

*Walter Bachrach*, *E. M. Harber* and *Whitecotton & Wight* for respondent.

(1) The statute under which the indictment is drawn was repealed by the passage of the Act of 1907 relating to bucketshops. A subsequent statute revising the whole subject of a former one, and evidently intended as a substitute for it, operates to repeal the former, although it contains no express words to that effect. *State v. Shields*, 230 Mo. 91; *Meriwether v. Love*, 167 Mo. 514; *Manker v. Faulhauber*, 94 Mo. 430; *State v. Roller*, 77 Mo. 120; *State v. Summers*, 142 Mo. 595; *State v. Patterson*, 207 Mo. 145; *State v. Crane*, 202 Mo. 54; *U. S. v. Tynen*, 11 Wall. 88; *Murdock v. Memphis*, 20 Wall. 590; *U. S. v. Clafin*, 7 Otto, 546; *Tracy v. Tuffly*, 134 U. S. 206; *Murphy v. Utter*, 186 U. S. 95; *Soby v. People*, 134 Ill. 66. (2) Where the subsequent statute makes the doing of an act a felony, which by the prior act was made a misdemeanor, such subsequent act impliedly operates to repeal the former. *State v. Taylor*, 186 Mo. 616; *State v. Robertson*, 159 S. W. 713; *Sullivan v. People*, 15 Ill. 233; *People v. Cleary*, 35 N. Y. Supp. 588; 36 Cyc. 1095. (3) A subsequent act necessarily repeals a prior one

when there is a conflict and repugnancy between the two, so clear that they cannot stand together. *State v. Shields*, 230 Mo. 91; *State ex rel. v. Macon County*, 41 Mo. 458; *State ex rel. v. McDonald*, 38 Mo. 535; *State ex rel. v. Dolan*, 93 Mo. 647; *Manker v. Faulhauber*, 94 Mo. 430; *State ex rel. v. Wofford*, 121 Mo. 61; *State ex rel. v. Spencer*, 164 Mo. 48; *State v. Taylor*, 186 Mo. 608.

ROY, C.—Defendant was indicted in twenty-five counts, of which eighteen are based on section 4782, Revised Statutes 1909, forbidding the keeping of an office, store or other place for the purpose of dealing in options. The other seven counts are based on sections 4780 and 4781 prohibiting dealing in options.

The defendant promptly moved to quash the indictment on the grounds that it did not charge any offense, that the statute on which it is based has been repealed, that the indictment and each count thereof are contrary to the Fourteenth Amendment of the Constitution of the United States, and to section 30 of article 2 of our State Constitution, in that it seeks to deprive defendant of his liberty and property without due process of law, that the indictment is contrary to section 10 of article 1 of the Constitution of the United States, and that different, separate, distinct and inconsistent offenses are alleged in the different counts. The motion to quash was sustained, and the State has appealed.

The bucket-shop law was enacted in 1887 and was amended in 1907. As thus amended it appears as sections 4772 to 4779, inclusive, of the Revised Statutes. The statute against option dealing was enacted in 1889, and, with amendments not important to be discussed at this time, appears as sections 4780 to 4788 of the Revised Statutes.

Sec. 4781,  
R. S. 1909.

Respondent seriously contends that section 4776 of the bucket-shop law, enacted in 1907, is almost verbatim the same as 4781 of the option-dealing law, enacted in 1889, and that the former section being later in date of enactment operates as a repeal of the latter. It should suffice to say that on its face section 4776 is a supplement to the four sections immediately preceding it. Those preceding sections are incorporated into it, and it has no force or effect except as modified by the four sections referred to. On the other hand, section 4781 is supplementary to the next preceding section. Thus sections 4776 and 4781 have distinct offices to perform and the enactment of one has no effect on the other.

II. Section 3 of the bucket-shop law of 1887 is practically the same as section 4782, Revised Statutes 1909, prohibiting the keeping of a place for  
**Sec. 4782,**  
**R. S. 1909.** option dealing. That section was expressly repealed by the bucket-shop law of 1907. Respondent contends that as those two sections are the same, the repeal of one was a repeal of the other. We think not and shall state our reasons.

As between section 3 of the bucket-shop law of 1887 and section 4782 of the Revised Statutes of the option dealing law, enacted, in 1889, the latter, being enacted last, would supersede the former and operate as a repeal thereof. No doubt the only reason for expressly repealing section 3 by the Act of 1907 was the fact that it had been superseded by section 4782 of our present statute.

All rules for the interpretation of statutes are merely for the purpose of discovering the legislative intent. We cannot believe that it was the legislative purpose to withdraw the ban against the keeping of an office, store or other place for dealing in options. If it was the purpose to repeal section 4782, Revised Statutes 1909, there should have been an amendment

of sections 4785 to 4788 inclusive, in which that section is expressly referred to by number.

II. Counsel for respondent have made no attempt to cite authority on the proposition that the law is unconstitutional. It was said in *State v. Constitutional. Kentner*, 178 Mo. l. c. 495, that such a contention is without merit.

The judgment is reversed and the cause remanded for trial. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All concur, except *Faris, J.*, not sitting.

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THE STATE, Appellant, v. W. A. LONG.

Division Two, July 14, 1914.

Appeal from Randolph Circuit Court.—*Hon. James D. Barnett*, Judge.

REVERSED AND REMANDED.

For attorneys and briefs, see *State v. Long*, *ante*, p. 315.

ROY, C.—The facts so far as necessary to be stated are the same in this case as in another case just decided against the same defendant, *ante*, p. 314, and, in accordance with the opinion in that case, the judgment is reversed and the cause remanded for trial. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All concur, except *Faris, J.*, not sitting.

WILLIAM R. NELSON v. BERNARD ALPORT  
et al.; LENA ALPORT, Appellant.

Division Two, July 14, 1914.

**CONVEYANCE:** By Married Woman with Husband: Fraud: Evidence. Evidence held to support a finding that a conveyance of land was valid, having been signed and acknowledged by the grantor, a married woman, without fraud or coercion.

Appeal from Jackson Circuit Court—*Hon. W. O. Thomas*, Judge.

**AFFIRMED.**

*T. A. Frank Jones* for appellant.

(1) It being conclusively proven that appellant at the time she signed the deed sought to be set aside refused to acknowledge it and declared it was not her free act and deed, the burden of proof as to any subsequent acknowledgment is upon the respondent. (2) The evidence does not justify the finding that appellant acknowledged her signature to the deed. (3) Such finding, if justified, is not decisive of any material issue in the case. (4) When respondent's agents requested appellant to sign the deed and informed her that they had brought the money due under the contract for payment or tender, and when she refused to make the deed, that was a sufficient tender in law. *Stephenson v. Kilpatrick*, 166 Mo. 262. When they insisted upon displaying and counting the money, at the same time declaring to appellant that the contract was binding on her and threatening her with the consequences of a lawsuit, they went beyond their rights, and their statements so made to her should be held as representations, and any benefit or advantage obtained by such means should be critically



examined. (5) The evidence justifies the conclusion that respondent's agents made the tender in gold in the expectation thereby to unduly influence the mind of appellant and her husband; and, in any case, they observed that the display of the gold did have such an effect upon appellant's husband as to make him eager to give the deed which he had at first refused, and made use of his influence and authority with appellant to obtain her signature to the deed; and by reason thereof respondent is answerable for any undue or unfair influence exerted upon appellant resulting from the display of the gold. (6) While the argument about giving the deed was pending, respondent's attorney caused one Mr. Hock to be sent for as appellant's attorney with the knowledge that he was favorable to respondent's pretensions with respect to the deed, and respondent is therefore answerable for any undue influence exerted upon appellant's mind by Mr. Hock. (7) The combined influences brought to bear upon appellant with respondent's connivance as shown by the evidence subdued appellant's will to such an extent that in signing the deed she acted under moral duress, and it should be set aside. *Sharpe v. McPike*, 62 Mo. 301; *Bell v. Campbell*, 123 Mo. 1; *Berlien v. Bieler*, 96 Mo. 491; *Turner v. Overall*, 172 Mo. 271; *Benn v. Pritchett*, 163 Mo. 560; *Hensinger v. Dyer*, 147 Mo. 219; *Davis v. Luster*, 64 Mo. 43; *Stonemets v. Head*, 248 Mo. 243; *Turley v. Edwards*, 18 Mo. App. 682. (8) In the circumstances of this case no actual tender by appellant was necessary; the offer in the cross-bill to repay the money satisfies the requirements of the law. *Deichman v. Deichman*, 49 Mo. 107; *Hogan v. Bank*, 182 Mo. 319.

*Watson, Watson & Alford* for respondent.

(1) The judgment is for the right party, for the reason the plaintiff dismissed his suit in ejectment,

and when that was done there was no authority under the statute for filing the so-called amended counterclaim. R. S. 1909, sec. 2386; Bliss on Code Pleading, sec. 367. (2) The so-called counterclaim is not a counterclaim authorized by the statutes of Missouri, but is an entirely separate cause of action existing primarily against a party not a party to the suit when petition was dismissed, and under such a pleading relief must primarily be held against such third party. R. S. 1909, sec. 1807; Jones v. Moore, 42 Mo. 413. (3) Under the pleadings and evidence appellant was not entitled to rescind the contract and cancel the deed and the judgment of the court was for the right party. (4) There was no fraud practiced on appellant by Ennis and no moral duress was shown and the judgment of the court should be sustained. (5) There was no offer to return the money received or to put the respondent *in statu quo*, and appellant was not entitled to any equitable relief. Mastin v. Grimes, 88 Mo. 490; Smith v. Melton, 65 Mo. 315; 39 Cyc. 1378; Frink v. Thomas, 20 Ore. 265; Powell v. Plant, 23 So. 399; Vance v. Newman, 72 Ark. 359; Neal v. Reynolds, 38 Kan. 435; Drew v. Pedlar, 87 Cal. 443; Breyfogle v. Walsh, 80 Fed. 172; Wiell v. Malone, 159 N. Y. 523. (6) There was no moral duress shown in this case, and this case does not fall within the class of cases cited in appellant's brief. (7) Ennis was not respondent's agent in the purchase of property from appellant.

WILLIAMS, C.—This suit was originally instituted by the plaintiff's filing in the circuit court of Jackson county, Missouri, his petition in ejectment against Lena Alport and her husband Bernard Alport to recover the south one-half of lot 383, block 29, in McGee's Addition to Kansas City, Missouri; the property was known as No. 1731 Grand Avenue, Kansas

City, Missouri. Defendants filed answer asking for affirmative equitable relief. It appears that some time after the suit was originally instituted plaintiff instituted in a justice of the peace court in Kansas City a suit in unlawful detainer to recover from the defendants the possession of the same property. Thereafter plaintiff in attempting to dispose of the case in the circuit court dismissed his petition, but the court, over the objection of plaintiff, refused to dismiss the answer of defendant on the ground that it asked for affirmative relief. Thereafter plaintiff filed a reply to the amended answer of defendants. Later defendant Lena Alport filed her separate amended answer and cross-bill undertaking to make H. R. Ennis and one T. H. Thompson defendants in the cause. Unsuccessful motions were made by the plaintiff and defendants Ennis and Thompson to strike the cross-bill from the files. Later plaintiff filed a reply to the separate amended answer of the defendant Lena Alport and it was upon the issues thus raised by the answer of defendant Lena Alport and plaintiff's reply thereto that the trial was had in the circuit court. By her separate amended answer and cross-bill, defendant Lena Alport in substance alleged: (1) That on June 5, 1908, she was the owner of the above mentioned real estate and on that day signed and delivered a contract by which she agreed to sell said real estate to defendant Torrey H. Thompson for the sum of \$20,000, one thousand dollars of which was recited in said contract to have been deposited with H. R. Ennis & Co. (as agents of defendant), to be applied on the purchase price; fourteen thousand dollars in cash upon the delivering of a general warranty deed to said property; said property to be conveyed subject to a deed of trust which was then on the property amounting to the sum of five thousand dollars and also subject to State and county taxes; that said contract further provided that

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defendant might remain in possession for two months from the date of the delivery of the deed, at a monthly rental of \$25; (2) that the making of said contract was procured by fraud on the part of plaintiff and defendants Ennis and Thompson in this—that said Ennis was engaged in the real estate business in Kansas City under the name of H. R. Ennis & Company and that said company assumed to act as agents of this defendant and accepted the deposit of one thousand dollars on the purchase price on behalf of this defendant when the said Ennis was in fact the agent of the plaintiff for the purpose of purchasing the above described property; that said Thompson was associated with defendant Ennis and aided Ennis in procuring said contract; that defendant Ennis concealed that he was the agent of plaintiff and made defendant an offer of twenty thousand dollars for the property as coming from the defendant Thompson; that defendant refused to accept said offer but offered to sell the same for twenty-five thousand dollars; that said Ennis in order to deceive and defraud said defendant, Lena Alport, represented that if she would sell her said property for the sum of twenty thousand dollars, he, the said Ennis, would cause to be sold to her the south half of lot 377 in McGee's Addition to Kansas City, Missouri, known as 1707 Grand Avenue for the sum of eighteen thousand dollars; that the premises numbered 1707 Grand Avenue were in the same block as defendant's above described property and of the same dimensions as defendant's property and the improvements thereon were as good or better than those upon defendant's lot; that thereupon said Ennis prepared and presented to her and her husband for their signature the written contract for the sale of defendant's property as above mentioned; that defendant and her said husband were unable to read or write in the English language and that defendant relied upon the honesty and good faith

of defendant Ennis and signed the above mentioned contract by making her mark thereon, believing that it was a proper and necessary step for carrying out and effecting the exchange of properties in accordance with the offer made to her by defendant Ennis; that after she and her husband had signed the above mentioned contract said Ennis refused to make a contract to sell the property at 1707 Grand Avenue for the sum of eighteen thousand dollars; that said Ennis and Thompson were the agents of the plaintiff and that the recital in said contract that H. R. Ennis & Company were the agents of defendant was false; that the one thousand dollar deposit mentioned in said contract was never in fact made; that defendant never intended to make a contract of the above import and effect but that her signature was obtained thereto by the fraud and misrepresentations above mentioned and for that reason the same ought to be set aside and held as fraudulent and void; (3) that afterwards in order to make this defendant perform the fraudulent contract above mentioned said Ennis with three other persons came to plaintiff's home and presented to her a warranty deed for her signature which the defendant refused to sign; that said Ennis told defendant that if she refused to execute the deed he would have the deed of trust on her property foreclosed and the property sold so that the same would become wholly lost to the defendant; that he induced defendant's husband to join with him in endeavoring to force defendant to execute said deed; that at said time defendant was in a sick and weakened condition and unable to cope with said Ennis and other persons to protect her rights and to withstand the threats and statements of said Ennis and her said husband and that by reason of the same, she, jointly with her husband, executed said warranty deed whereby she conveyed said property to said Ennis for the sum of fifteen thousand dollars in cash and subject to the said

deed of trust for five thousand dollars but that the same was not her free act and deed and that this defendant was coerced, overreached and defrauded into executing said deed; that in all the matters and things aforesaid Ennis was the agent and acting for the plaintiff; that at the time said deed was executed said Ennis paid to defendant's husband fifteen thousand dollars, which sum defendant is ready and willing to repay said Ennis or to the plaintiff and now offers to pay the same as the court may adjudge or to pay the same into this court upon its decree setting aside said deed and contract; that afterwards said Ennis conveyed said property by warranty deed to the plaintiff herein. (4) The prayer of the answer was that the above mentioned contract and deeds be set aside and that the title to said property be adjudged and decreed to be in this defendant and for such further relief as may be just and equitable in the premises.

The reply contained in substance the following allegations: (1) General denial, except that it admitted that defendant and her husband conveyed said real estate to the said H. R. Ennis for the sum of fifteen thousand dollars in cash subject to said mortgage of five thousand dollars; (2) that on the 24th day of June, 1908, defendant sold and conveyed said real estate to said H. R. Ennis for the above mentioned sum and that said H. R. Ennis by warranty deed conveyed said property to said plaintiff herein at and for the same consideration; that plaintiff is now the owner in fee of said property; that immediately after plaintiff purchased said property he rented said premises to defendant and her husband at and for the sum of twenty-five dollars a month and that said defendant occupied said premises as tenants of the plaintiff and paid rent therefor as such tenants up to and including March 24, 1909, when defendant and her husband refused to make further payments of rent and

refused to give up possession of said premises; (3) that defendant and her said husband have ever since kept and retained said sum of fifteen thousand dollars and have never made any lawful tender thereof to plaintiff herein; that prior to the time defendant and her husband executed the said deed they had full knowledge of all their alleged rights, if any they had to have said deed set aside but never asserted said rights or any claim in that behalf until long after May 1, 1909, and that by reason thereof they are estopped to assert any right to set aside said deeds; that defendant's claim is wrongful and malicious and without any foundation in fact and prays that judgment be entered against the defendants adjudging that they have no right, title or interest in or to said premises or to have said deeds set aside and that judgment be entered that plaintiff has the right to the immediate possession of said premises and that defendants be compelled to surrender said premises to the plaintiff and that plaintiff be allowed damages and for such other relief as to the court may seem meet and just in the premises. Trial was had in the circuit court resulting in a judgment in favor of plaintiff and against the defendants. The trial court found that on June 24, 1908, defendant and her said husband conveyed said property to H. R. Ennis for the sum of twenty thousand dollars, fifteen thousand dollars of which was paid in cash and the remaining five thousand paid by the assumption on the part of said Ennis of the five thousand dollar mortgage then existing on said property, and that on said date said Ennis conveyed said property to said plaintiff herein and that plaintiff since that time has paid off said mortgage; the court further found that said Lena Alport signed the deed to Ennis and acknowledged the same as her free act and deed and that no fraud was practiced on her by said Ennis or said plaintiff or his agents in securing her signature to the deed. The

court further found that the plaintiff was the owner of, and entitled to the immediate possession of, said real estate; that defendants were not entitled to have said deeds set aside or entitled to remain in possession of said premises; that defendant's amended answer and counterclaim be dismissed and that plaintiff recover his costs.

The record is voluminous and the testimony very conflicting.

Defendants' testimony concerning the decisive issues in the case was substantially as follows: Mrs. Alport testified in her own behalf stating that she was thirty-nine years old; was born in Russia but had lived in the United States twenty-four years; that in June, 1908, she owned the real estate in controversy; that she and her husband used the property as their home and also conducted a new and second-hand store business on the premises; that she and her husband had been in the second-hand business together for about twenty-three years; that a few days before June 5, 1908, Mr. Ennis and Mr. Thompson called at her place of business and asked for a price upon her said property; she told them she would not take less than twenty-five thousand dollars; that Mr. Ennis offered her twenty thousand dollars and she refused the offer; that Mr. Ennis then told her that the property at No. 1707 Grand Avenue, which was in the same block as her property, was the same sized lot and had better improvements on it than her own, could be purchased for eighteen thousand dollars and that Mr. Ennis made the proposition that if she would sell her property to him for twenty thousand dollars he would sell the property at 1707 Grand Avenue to her for eighteen thousand dollars; that she accepted this last proposition; that Mr. Ennis agreed with her that he and her husband would go down to an attorney's office, that of Mr. Leon Block, and have two contracts drawn, one providing for the sale of her property to Ennis



and the other providing for the sale of the property at 1707 Grand avenue to her; that she understood Mr. Ennis was the buyer of her property but that he did not mention anybody as being the buyer; that thereupon Mr. Ennis and her husband went away saying that they were going down to Mr. Block's office to have the contract drawn; she later went to Mr. Block's office and found nobody there but the office girl. She received a telephone call to come home and when she arrived home she found Mr. Thompson and another young man there; that Mr. Thompson told her that he had the contract ready to sign and that she signed the contract; that after signing the contract she said to Mr. Thompson: "Where is my contract?" and Thompson replied: "It is too late, you can't get it." That when she signed the contract Mr. Ennis said: "Please don't tell anybody. Keep quiet." That Mr. Thompson read the contract over to her but that she didn't understand what half of it meant; that when she signed this contract she thought she was going to get a contract so that she could purchase the property at 1707 Grand Avenue and that otherwise she would not have sold her property. That when Mr. Thompson told her it was too late for her to get the other property she thought to herself that she "would not give him the abstract" but that finally her husband went down to the "mortgage man" and gave Mr. Thompson the abstract; that she had no further talk with Mr. Thompson or Mr. Ennis until they afterwards came down to her place of business to get her to sign the deed. On this occasion, Mr. Ennis, Mr. Thompson and two other gentlemen came to her place of business about eleven o'clock in the morning, carrying a satchel, and Mr. Ennis said, "Here is \$20,000," and opened the satchel and spread the money, which consisted of gold pieces, out on the floor of the store. That she did not touch the money and did not want her husband to touch it; but that they asked her hus-

band to count the money and helped count it; that Mr. Ennis and Mr. Thompson said: "Mrs. Alport you have got to sign a deed. We have got a contract and we will go by law you should sell it; we will make you sell it." And one of them said that "they had plenty of money to file suit" and another said they would close me out and I would lose my property and I didn't know what to do. That she said to them: "I won't sign the deed because you've fooled me and I don't want to sell it and I will not sell it for anything." That her daughter, Mrs. Peltzman, was in the store when the gentlemen came and later Mrs. Peltzman's husband came to the store. Later a Mr. Hock came to the store (it will appear later that Mr. Hock was an attorney officing in Mr. Block's office and was the notary who took the acknowledgment to the deed); that she didn't know why Mr. Hock happened to come to the store but that he told her she should sign the deed and get through with it; that during the time the money was on the floor the front door to the store was locked; that she was sick and did not know what to do but that Mr. Hock said: "Well, do it anyhow, Mrs. Alport, sign the deed and get through, I can't stay here all afternoon;" that Mr. Hock was not representing the four gentlemen and was not representing her; that her husband urged her to sign the deed and said to her: "You are sick and I am going away to leave you with the children and I will go away and you can do anything you want;" that finally she took hold of the pen and made her mark and Mr. Hock said: "Mrs. Alport, will you swear?" and, "Do you sell of your free will?" and I said, "No, sir," and then he said: "Gentlemen, she don't sell with a free will," and the other gentleman says, "Never mind, we got her signature anyhow." After that Mr. Ennis and Mr. Thompson, my husband and my son-in-law all went to the bank with the money; that she did not want to go to the bank, but that her daughter said,

“Mama, papa says he is going to leave you,” and for that reason her daughter made her go, that she went down to the bank but did not touch the money and did not care for it; that she did not authorize Mr. Ennis’s firm to receive one thousand dollars for her upon the contract; that she did not pay Mr. Ennis or any one else any rent on the place after the deed was made; that the first time she knew any rent was being paid was when notice was served upon her to move out and that she sent Mr. Nelson and Mr. Ennis a letter which she had her daughter write for her and which she had sworn to before a notary public. The letter here referred to was as follows:

“Kansas City, Mo., Oct. 12, ’08.

Messrs. H. R. Ennis & Co.,

Dear Sirs:

I will not give up possession of premises No. 1731 Grand Avenue until you pay me the other five thousand dollars. You know, as well as I do, that the sale was as is no sale, that you forced me to sell against my wish, in fact cheated me out of my home. You also know that my original price was twenty-five thousand dollars, and as I understood the contract to read the price was to be twenty thousand dollars net, you to pay the mortgage of five thousand. You seemed to think me an unimportant personage, bargaining with Mr. Alport, and even sending me, the owner, into the kitchen. You threatened me with suit at the time, and thought you would scare me, but I never was scared, and wish I had let you file suit. Now what I have to say is that if you want a clear deed and title to that property you will obtain it only by paying me the remaining five thousand dollars. You will want possession of the place, but you will never get it for I am prepared to stay here until this matter is settled in a satisfactory way. I know you will file suit for ejecting me, but there is where trouble

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will start for you, for I will carry this affair on from court to court, even to the Supreme Court of the United States. I don't care if it takes one hundred years to come to a close, and if I don't get it settled, my children or grandchildren will. No amount of litigation will make me give up my home unless I get the remaining money. If you don't want to do this, I can return the fifteen thousand dollars you gave me at any time. Then you will not get it even for Fifty thousand dollars. I don't want you to think that this is the last of this affair as I mean all that I say or write.

Respectfully,

<sup>her</sup>  
LENA X ALPORT.  
<sub>mark</sub>

Witnesses.

M. FINKELSTEIN,

I. PELTZMAN.

Subscribed and sworn to before me this 12th day of October, 1908.

H. RUBENSTEIN,

(Seal)

Notary Public.

My commission expires May 14, 1911."

The witness further testified that the fifteen thousand dollars was deposited in her husband's name. On cross-examination she testified that Mr. Thompson never did offer to give her twenty-five thousand dollars for her property but that they offered to give her twenty thousand dollars for her property and sell her the property at 1707 Grand avenue for eighteen thousand dollars but never offered to sell her the property after that time. That at the time she and Mr. Ennis came to terms about the sale of the property, Mr. Ennis asked who their lawyer was and defendant's husband said, "Mr. Block," and thereupon Mr. Ennis agreed that they would go to Mr. Block and have him draw up the contract; that she did not know that Mr. Hock worked in Mr. Block's law office. She further testified that at the time she signed the deed she was not scared about what Mr. Ennis said about

his going to sue her but that she was scared on account of her husband's saying he was going to leave her. She was asked if she was willing to trust her husband with the fifteen thousand dollars. The only answer that she would make to this question was, "He had it in the bank;" that afterwards her husband bought some property on 18th street and had the deed made in her name. When asked if her husband used a part of the fifteen thousand dollars that was in the bank to buy this property she answered: "I don't know, I guess he did." She further testified that when she went before the notary and took an oath as to the contents of the letter above copied she knew what was in the letter. She further testified that Mr. Block had acted as her attorney on one prior occasion when she purchased some property. William R. Nelson, the plaintiff, was called as a witness for the defendant and testified as follows: That he was the grantee in the deed whereby Mr. Ennis and wife conveyed to him the property in question for a consideration of twenty thousand dollars; that sometime before the purchase of this property he requested Mr. Ennis, who was a real estate dealer, to come to his office, and stated that he was desirous of finding a new location between Seventeenth and Eighteenth or between Sixteenth and Seventeenth streets and desired a strip three hundred feet wide running from street to street in any one of those blocks. At this time Mr. Nelson stated to Mr. Ennis the price that he would be willing to give for such a location and told Mr. Ennis that he did not care to have the matter advertised or as stated in the witness's language: "We didn't care to put it on the bill board." That he fixed a price above which he would not go and that he was not to pay Mr. Ennis any commission and did not pay him any commission but that Mr. Ennis was to get his commission from the people who sold their property and that Mr. Ennis was not in any sense "our agent;" that he did not

hear of the tender of fifteen thousand dollars in gold until after it was made; that he called upon Mr. Ennis to find this property for him because he understood that Mr. Ennis handled considerable property in that locality. The witness did not know anything about the terms of the transaction but stated that those matters were attended to by his employee, Mr. Seested. Mr. Seested was called as a witness for the defendant and stated that he was in the employ of Mr. Nelson at the time of the purchase of the property for the new site and stated that after Mr. Ennis would make purchases of properties and make first payments on the same, Mr. Nelson would reimburse him for the outlay; that Mr. Ennis was not to receive any compensation from Mr. Nelson for the purchase of this property; that Mr. Charles H. Adams, an attorney, examined the abstracts of title to the respective pieces of property for Mr. Nelson. This witness testified to the prices given for several of the other lots which were included in this three hundred foot strip purchased for the new site and from this evidence it appears that some of the properties cost more than was given for defendant's property and some of the properties were purchased at a less figure but it appears that the price paid to defendant was at least an average, if not a little above the average price paid for all of the properties on Grand avenue.

Meyer Peltzman, son-in-law of Mrs. Alport, testified for the defendant that he was present when Mrs. Alport executed the deed on June 5, 1908; that he arrived at the store about 12:30 p. m., and Mrs. Alport was behind a desk back of the counter and her husband was on the floor counting the gold; that Mrs. Alport kept telling her husband to leave the money alone but that he kept counting it and seemed excited. That when they got through counting the money, Mr. Ennis and the other gentlemen asked Mrs. Alport to sign the deed but she refused to sign it;

that later Mr. Hock came to the store but the witness said he didn't know why Mr. Hock happened to come; that Mr. Ennis and the other gentleman kept asking Mrs. Alport to sign the deed and told her that she had her money and everything else and the best thing she could do would be to sign because "it would be just a lot of trouble, lawsuits and one thing and another and the best you can do is to sign it and settle it up." And that Mr. Hock said, "You had better sign the deed. - You have got the money and everything straightened up and you will have lawsuits and one thing and another." That finally they persuaded her to sign the deed and that then Mr. Hock wanted her to acknowledge the deed as of "her own free will" and Mr. Ennis asked her to swear it was of her own free will but she refused "to swear" and Ennis said: "Well, leave it go at that, she didn't have to swear to it." That before the deed was signed Mrs. Alport and her husband conversed with each other in the Hebrew language and Mr. Alport told her that if she was not going to take the money and sign the deed, "he was going to leave, leave her with the children." The witness stated that he did not telephone for Mr. Hock to come down to the store and did not know why Mr. Hock came down to the store or who sent for him; that he did not hear Mr. Adams state that he "would not accept any deed that this woman would not acknowledge to be her free act and deed;" the witness stated that he went with them when they took the money to the bank out of curiosity; that he went with his father-in-law but did not remember whether Mrs. Alport went to the bank or not; that he saw the fifteen thousand dollars counted out at the bank and put in a safety deposit box. Mrs. Fannie Peltzman, daughter of Mrs. Alport, testified that she was present when her mother signed the contract for the sale of the lot and that she signed her mother's name to the contract (her mother signed by mark); that

she was also present when her mother signed the deed. She corroborated her mother's testimony and her husband's testimony concerning the exhibit of fifteen thousand dollars in gold and stated that she did not know why Mr. Hock happened to come to the store and take the acknowledgment of the deed but that she did not think he was called by her father, mother or her husband. She further corroborates the testimony of her mother and witness's husband as to the conversation occurring at the time the deed was signed; that one of the men and Mr. Hock said to the witness: "Well, Mrs. Peltzman, you just write her (Mrs. Alport's) name down." Witness said she did so because she wanted to be "respectful." She said that the reason her mother gave for not wanting to sign the deed was that she wanted that place up on Seventeenth street, or else she wanted twenty-five thousand dollars. The witness corroborated her mother's testimony concerning the agreement reached between Mr. Ennis and Mrs. Alport prior to the execution of the contract for the sale of this land and that when Mr. Thompson brought the contract for Mrs. Alport's signature he asked the witness to keep the sale secret. That he handed Mrs. Alport the contract but Mrs. Alport could not read English and handed the contract to the witness; the witness started to read the contract but Mr. Thompson took the contract out of her hands and went up toward the front of the store and read it so fast that the witness did not think that her mother understood a word of it; that after the contract was signed, Mrs. Alport asked Mr. Thompson for the other contract and that Mr. Thompson said: "It's too late, Mrs. Alport, I'm sorry." On cross-examination the witness testified that she wrote the letter which her mother sent to Mr. Ennis and Mr. Nelson; that she suggested to her mother to write this letter because she thought perhaps Mr. Nelson did not know anything about the



trick that had been played on her mother. When asked why she did not say anything in the letter about not getting the property at 1707 Grand avenue, she said that her mother did ask her to put that in the letter but she replied to her mother: "There is no use giving them your secrets." When asked if her mother was scared at the time she signed the deed conveying the property to Ennis she said: "She wasn't exactly scared. She was very much wrought up. Well, she wasn't scared about the deed or anything like that you know. She didn't want to sign that deed. I don't know what was in her mind. She wasn't scared at their threats but she was scared when papa said he was going away." That was the only thing that scared her. She said her father got excited over the fifteen thousand dollars in gold. Before the contract was signed she heard her father say, "Go up to Mr. Block and have the contract drawn," and that the men folks went up and that her mother went afterwards. The evidence on behalf of plaintiff Nelson and defendants Ennis and Thompson was substantially as follows: Charles H. Adams, attorney at law, testified that he was employed by Mr. Nelson to pass upon the abstracts to the various lots purchased by Nelson; that he was present at Mrs. Alport's place of business the day the deed from Mrs. Alport and husband to Ennis was executed; that he went down there at the request of Mr. Ennis; that before going down Mr. Ennis told the witness that Mrs. Alport and husband had refused to make a deed to the property and asked Mr. Adams what they should do in the matter. That he told them the only thing they could do was to make a legal tender. The witness told Mr. Ennis that he had better make the tender in gold so there could be no question about it. Upon reaching Mrs. Alport's place of business, the witness told her that they had come to make a legal tender of the amount due under the contract and to demand a deed to the property;

that defendants refused to make the deed saying that they were to get twenty thousand dollars in money; that he did not hear defendants say anything about the eighteen thousand dollar property on Grand avenue. When defendants refused to make the deed, witness said to them: "We will count the money out and tender it to you and of course if you don't give the deed, we will have to bring suit on the contract." That the money was then poured out on the floor and counted; that after that defendant's husband said they would execute the deed if Mr. Ennis would make some concessions with regard to the payment of some of the taxes and about letting the defendants stay in the premises for a while without paying any rent; that Mr. Ennis agreed to make the concessions. Witness then told defendant's husband that he would not accept a delivery of the deed unless defendant's attorney was present and advising them so that they would know exactly what they were doing when they delivered the deed and that thereupon Mr. Alport sent either his daughter or his son-in-law to telephone for his attorney, and after waiting awhile and the attorney not arriving, either the daughter or the son-in-law went out and telephoned again and in a little while Mr. Hock came in. After Mr. Hock came he consulted with defendants, aside from the rest of the party, and after the consultation the attorney, Mr. Hock, informed Mr. Ennis that defendants were willing to make the deed; that the deed was signed and Mr. Alport's acknowledgment was taken first; that when the notary, Mr. Hock, went to take Mrs. Alport's acknowledgment, he heard her say: "I don't acknowledge this to be my act and deed," and that thereupon witness said: "If she don't acknowledge it to be her free act and deed, we won't accept it;" that after waiting awhile, Mrs. Alport finally acknowledged the deed to be her free act and deed and the deed was

then delivered. Upon cross-examination the witness was asked if it was not their pre-conceived plan to make the tender in gold because the sight of gold "was likely to have a strong effect on a Jew." To this the witness replied that such was not their intention but that he had advised the use of gold so that there could be no question about the legality of the tender; that he had never seen the defendants before going down to make the tender; that the sight of gold did seem to have a certain degree of fascination to Mr. Alport but that the gold did not seem to have any effect on Mrs. Alport; that the conversation between Mrs. Alport and her husband was in Hebrew and the witness could not understand what they said in their conversation with each other; that after the deed was signed and delivered the parties all went up to the bank to have the count of the money verified; that the defendants seemed to be perfectly satisfied with the transaction when the money was being counted at the bank. William G. Hock, the attorney and notary who took the defendants' acknowledgment to the deed, testified that at the time the deed was signed he was officing with attorney Leon Block; that at Mr. Block's request the witness prepared the deed; that when he prepared the deed he had the contract for the sale of the property before him; that at the bottom of the contract for the sale of the property, Mr. Block had placed his "O. K." and that some of the interlineations in the contract for the sale of the property were made in the handwriting of Mr. Block; that one of these interlineations was: "The sellers have possession of property for two months from delivery of the deed at a monthly rental of twenty-five dollars and purchaser assumes all interest on encumbrance from date of delivery of deed." That prior to this transaction the witness had seen Mr. Alport in conversation with Mr. Block at the office but did not remember seeing Mrs. Alport there, and did not know

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whether she had consulted with Mr. Block about the matter or not; that before going down to Mrs. Alport's place of business on the day the deed was signed, Mrs. Alport's married daughter called him over the telephone and told him to hurry down and close the deal; that he was detained for a short time on account of other business and Mrs. Alport's son-in-law called him over the 'phone and also requested him to hurry down. That when he arrived at Mrs. Alport's place of business he found Messrs. Ennis, Adams and Thomas, Mr. and Mrs. Alport and their daughter and son-in-law there. The gold had been counted before his arrival and replaced in the valise. Witness afterwards saw the gold at the bank. That Mr. and Mrs. Alport objected to executing the deed at first. Upon being asked what reason Mrs. Alport gave for not wanting to acknowledge the deed the witness said: "Well, her reasons were, as I remember them, that she didn't think she was getting enough for the property, and the other reason that Mr. Nelson, they understood later that Mr. Nelson was going to be the owner of this property and they didn't know it at the time of the sale, and another party right next door had gotten more for their tract of ground and they thought they ought to have more. That is my recollection of the reasons that Mrs. Alport gave at that time." After the deed was signed the witness asked Mrs. Alport if she acknowledged the same as her free act and deed and that: "At first she said, 'I signed it but I didn't do it because I want to,' and I said, 'That won't do Mrs. Alport; you have to acknowledge it as your free act and deed before I can take your acknowledgment,' and she said, 'Well, I signed it all right,' I don't remember the exact words but to the effect that you can put your seal on there if you want to, and some one spoke up and said that was an acknowledgment and I said, 'No, I won't take that,' and she and her daughter con-

versed about the matter and I told her that they had signed a written contract to convey this property and she told me then that she wanted to get more for it, and I told her I didn't see how she could if she had signed a contract stating the price she was to get for it and if they tendered her what she had agreed to sell it for I thought it was her duty to sign the deed, and she then finally says, 'I do acknowledge it as my free act and deed.' I was particular because of the fact that a tender was being made." The witness filled out the acknowledgment and took the deed to his office where he placed his notarial seal thereon and later in the day delivered the deed to Mr. Ennis; that before the deed was signed the witness made some interlineations therein to the effect that the grantee should pay some city taxes and park assessments; that there was no change made in the deed after the acknowledgment; that after the deed was executed the witness thought that Mrs. Alport said that she wanted to put the money in the vault of the German-American Bank but that she was not dressed to go herself and said that "we" could go on and she would come later; that the bag of gold was taken down to the bank, Mrs. Alport following in a few minutes and after she arrived at the bank the money was counted out. The son-in-law seemed to be doing the counting of the money. On cross-examination the following occurred (Mrs. Alport's attorney asking questions):

"Q. Mr. Hock, hadn't Mr. Alport been up there and told you that he wasn't going to sign that deed?  
A. He didn't put it in that way.

Q. How did he put it? A. Do you want me to state?

Q. Yes. A. Well, of course, our office was his attorney and that is the reason I asked you that question. Mr. Alport said that he thought he could get more money out of this than the contract provided for and

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he wouldn't sign the deed. He came to me and says: 'Can't you break that contract.' He says, 'If you will get me out of that contract I will give you five hundred dollars.' I says, 'Mr. Alport, as far as I know the contract was entered into fairly and I wouldn't undertake to do it.'

"Q. Did he tell you at this time that Mrs. Alport wouldn't sign the deed? A. He said she wasn't going to sign the deed; that she would get out of it some way."

That sometime before the deed was executed, Mr. Alport told the witness that Mr. Ennis told them that they could buy another piece of property on Grand avenue for eighteen thousand dollars but that it had since been sold and he wasn't able to get it; that Mr. Alport did not claim that this was a part of the original agreement but that, "Mr. Alport seemed to think that he made a mistake in selling this property for the sum he did. He said he didn't know at that time; he said that he afterwards learned that Nelson was buying up the ground around there and if he had known it and held it he could have gotten a bigger price, and he went on to state that he took this price for it and thought it was a good price at that time but now he didn't, and he was a fool for making the agreement that he did."

Tennyson Thomas testified that at the time of the transaction he was connected with H. R. Ennis & Company; that he and Mr. Ennis called upon defendants for the purpose of trying to purchase their property and that defendants finally agreed to take twenty thousand dollars for the property, fifteen thousand dollars in cash and the balance to be paid by the assumption of the five thousand dollar mortgage on the place; that the original contract was submitted to Mr. Block before it was signed, because Mr. Alport would not sign it without Mr. Block's "O. K."; that the witness took the contract to Mr. Block's office and Mr.

Block had a conversation with Mr. Alport over the telephone, after which Mr. Block made some interlineations in the contract and then placed his "O. K." thereon. The witness then took the contract to defendants and read the contract over to Mrs. Alport and asked her if she understood it and that she seemed perfectly willing to sign the contract. The witness kept one copy of the contract and the defendants the other. That a few days later Mr. Alport told him that they would not execute the deed because he thought he was to get twenty-five thousand dollars for the property instead of twenty thousand dollars. The witness further testified that defendants did not agree to sell the property upon the condition that Mr. Ennis would sell them the eighteen thousand dollar Grand avenue property but that they did have an option on that property and were willing to sell it to the defendants and urged them at several different times to purchase the property at eighteen thousand dollars but that Mr. Alport said that he knew what property he wanted to buy and that he would buy a piece of property for about seven thousand five hundred dollars; that Mr. Ennis made a sale of the other Grand avenue property on June 17th; that Mr. Nelson did not care to buy the property at 1707 Grand avenue but that Mr. Ennis had procured an option on it and the firm was to make a commission of five hundred dollars in cash if they found a purchaser and that they were trying to sell it to any one who would buy it. The witness was present when the deed was executed by defendants; that Mr. Adams did most of the talking to defendants and refused to take the deed unless defendants had their attorney present and that some one telephoned for Mr. Hock; that he could not understand the conversation between Mrs. Alport and her husband because of their using a foreign language; that finally Mrs. Alport agreed to sign the deed and did sign it and that when Mr. Hock went to take her

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acknowledgment Mrs. Alport said it was not her free act and deed; that thereupon Mr. Adams told her and her husband that they did not want the deed unless it was of her free act and deed; that after that Mr. Hock talked to Mrs. Alport a minute or two and she then acknowledged it as her free act and deed. The witness and defendant's husband then got upon a street-car and took the grip containing the money to the German-American Bank at Fourteenth and Grand avenue. The witness further testified that the one thousand dollars required to be deposited by the terms of the contract of sale was deposited with H. R. Ennis & Company as stated in the contract and that the one thousand dollars was paid to them by Mr. Nelson's agent, Mr. Seested. H. C. Edward testified that he was present when Mrs. Alport signed the original contract for the sale of the premises and that Mr. Thomas read the contract over to her and explained its provisions to her and that after the contract was signed and just as witness and Mr. Thomas were leaving, Thomas said to Mr. Alport, "I would like very much to sell you another piece of property and I want to know when we can get together and go over the proposition." That Mr. Alport replied that he "did not care to figure right then but would see Mr. Thomas later;" that was all that was said about any other property at the time the contract was signed. The witness was also present at Mrs. Alport's place of business when the tender of fifteen thousand dollars in gold was made but left before the deed was signed. This witness, in substance, corroborates the testimony of plaintiff's other witnesses with reference to what occurred on that occasion. On cross-examination this witness further testified that at the time the contract for the sale of the property was made defendant's daughter read the contract over to Mrs. Alport and explained the contract to her, partly in English and partly in Yiddish, and that Mrs.



Alport said that she understood it; that the property at No. 1707 Grand avenue was not referred to at that time; that after the contract was signed and before the deed was executed Mr. Alport was at the office of Ennis & Company one day and the Company through their salesmen attempted to sell several pieces of property to Mr. Alport; that one piece of property offered at this time was the property at 1707 Grand avenue, the same being offered at a price of eighteen thousand dollars, but that Mr. Alport refused to do anything in the matter and said he did not want to buy at present. H. R. Ennis testified that he was not present when the contract of sale was executed by defendants but that he negotiated the matters preliminary to the signing of the contract and that the contract as signed expresses the agreement which he and defendant reached concerning the sale of their property. Some time after the contract was signed, Mr. Alport came to the witness's office and delivered an abstract to the property; that Mr. Alport was in the office of the real estate company often between the signing of the contract and the execution of the deed; that at the time the contract of sale was signed on June 5 and up until June 17, the witness's real estate firm had the sale of the property known as No. 1707 Grand avenue at a price of eighteen thousand dollars; that the firm attempted to interest a number of people in the purchase of this property, among others, Mr. Alport, but that Mr. Alport said he did not want to buy property on Grand avenue because it was too high and another reason he gave was that he did not like the Jew who lived next door to No. 1707; that after trying to sell the property to a number of persons the firm succeeded in selling the property on June 17th, for the sum of eighteen thousand dollars and the firm received a five hundred dollar commission out of that; that the firm did not receive any commission in handling defendant's property; that a day

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or two prior to the defendants executing the deed, witness had notified Mr. Alport that they were ready to close the deal and Mr. Alport had agreed to meet them at Mr. Block's law office; that Mr. Alport failed to keep his appointment; that thereupon the witness consulted Mr. Adams and Mr. Adams said, "We had better get within our rights and make a tender;" that Mr. Adams "looked after all the legal ends of the transaction." That witness requested Mr. Adams to go with them to make the tender; that they discussed whether they would take United States Treasury notes or gold and that Mr. Adams said: "Rather than have any question about it, the best thing to do would be to take gold; that can't be questioned;" that after the tender was made defendants refused to execute the deed, saying that they were not getting enough money for the property; the witness details what occurred, as follows:

"We told them, at least I think I did, that they made a contract and we thought it was good, and if they didn't sign it we were going to endeavor to enforce it through the courts. There was a good deal of talk back and forth. Mrs. Alport talked to her daughter and her daughter wanted her to sign and her husband wanted her to sign and, finally after we agreed to pay the taxes, pay the special taxes for paving and some other taxes, I have forgotten what they were, she said she would sign. At that time Mr. Adams suggested and said they ought to have their attorney there, and either the son or the daughter went out and telephoned—son-in-law or daughter—and eventually Mr. Hock came in and she signed the deed. After the thing was explained to him and he asked her if she acknowledged this as her free act and deed, she said, 'I signed the deed but I don't acknowledge it as my free act,' and he said, 'I can't take the acknowledgment unless it is acknowledged as her free act.' And I said, 'Mr. Hock, as long as she

signs it, isn't that a good deed?' and he said, 'No, she has to acknowledge it as her free act and deed.' And Mr. Adams spoke up and said, 'We don't care for the deed unless it is her free act.' And she then, after conferring with her daughter and Mr. Hock—her husband didn't talk to her at that time—she signed the deed and acknowledged it and held up her hand and signed it. . . .

"Q. Did you say anything or make any threat to Mrs. Alport to induce her to sign that deed? A. The only thing I said was that we had made a contract in good faith, a contract had been made in good faith and that Mr. Nelson would try to enforce the contract."

Witness further testified that before the deed was finally executed he made concessions to defendants which were not required in the contract of sale. One of these concessions was with reference to his paying some special taxes amounting to three hundred and twenty dollars and city taxes amounting to about fifty dollars, that when Mrs. Alport executed the deed she asked witness about the rent on the place and witness told her that he would allow her to use the premises for two months without the payment of any rent and that Mrs. Alport wanted a receipt for it and thereupon witness wrote upon the back of the contract a statement to the effect that Mrs. Alport had paid fifty dollars rent for two months; that after the two months had expired they continued to occupy said premises and paid rent for August, September and October, paying twenty-five dollars a month for two of said months and thirty dollars for one of said months; that thereafter defendants refused to pay rent and defendants were given notice to vacate the premises. .

Appellant contends that the findings and decree of the court are erroneous because they are "against

Conveyance by the weight of the evidence" and  
Married Woman: "contrary to equity and good con-  
Fraud: Evidence. science."

Since the above is the decisive question in the case it became necessary in making the foregoing statement of facts to set forth, more fully than would otherwise be necessary, the testimony of the respective witnesses.

We have carefully and painstakingly reviewed the entire evidence and have reached the conclusion that the weight of the evidence is in support of the decree entered by the trial court. It would serve no useful purpose to discuss at length, or in detail, the weight of the evidence but it is perhaps not amiss that we should discuss some of the main features of the testimony which leads us to the conclusion reached.

The case is mainly built around the following controverted issues of fact: (1) Was Mrs. Alport fraudulently induced to sign the original contract under the belief that her obligation to sell or convey her property was upon the condition that she was to receive the title to another property in the same block for the sum of eighteen thousand dollars? (2) Was she caused to sign the deed by reason of the alleged fraud upon the part of Mr. Ennis? (3) Did she properly acknowledge the deed?

In the view that we take of the case it will not become necessary to determine whether Mr. Ennis was so far the agent of plaintiff as to bind or affect the plaintiff by whatever was done by Mr. Ennis in the transaction, but for the purposes of the discussion we will assume that he was such agent.

With reference to the first question of fact the evidence was as stated by appellant in her brief "irreconcilably contradictory." But the fact that defendant in her sworn letter to Ennis based her refusal to surrender possession on the ground that she was to have twenty thousand dollars, net, under the con-

tract and was therefore entitled to five thousand dollars additional money, and in said letter made no mention whatever of her present contention, to-wit, that her grievance was based upon her failure to be allowed to become the purchaser of the eighteen thousand dollar property, would strongly indicate that the claim now made was an afterthought.

With reference to the second issue of fact, defendant testified that she signed the deed not because of threats of suit, etc., made by Mr. Ennis but that she was coerced into signing the deed by reason of the threat made by her husband that he would leave her and the children if she did not sign the deed. It appears that the alleged threat upon the part of the husband was made in a language not understood by Ennis and his associates. It is not contended nor does the evidence show that Mr. Ennis urged or procured the husband to make such a threat, but it is insisted that the act of Ennis and associates in making tender of the agreed purchase price in gold so operated upon the mind of the husband as to cause him to make the threat.

That the person making the tender was within his legal rights in making the offer in gold cannot be seriously doubted. But the fact that it was so made and the manner in which it was made might well cause a court of equity to carefully scrutinize the situation and to make mental tests for traces of fraud, and if the weight of the evidence should show other matters indicating suspicious circumstances, undue coercion or fraud, this somewhat unusual occurrence and therefore suspicious circumstance might throw added color upon the transaction. But where as here this slightly suspicious circumstance is not supported or surrounded by an atmosphere of fraud or suspicious circumstances, we do not regard the matter as having much weight. In fact, defendants' evidence does not show that the threat was the result of the sight

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of the gold. Whether the threat, if made, was caused by reason that the husband thought they were bound by the original contract, or convinced by advice of their attorney that they should do so or by reason of the sight of the gold or other reason is left to conjecture. We would indeed be reluctant in believing, in the absence of clear and cogent proof, that defendant's husband, a Hebrew, and, no doubt, possessing in common with the great majority of mankind in this somewhat material age a strong appreciation and desire for possession of gold, would be so far overcome by the sight of and the thought of the near possession of gold and so far forget himself as to violate that most sacred trait or characteristic of his race and people, to-wit, undying loyalty and fidelity to wife and family, by threatening in such a manner as would *convince* his wife, his lifelong and business companion and helpmeet, the mother of his children, that unless she signed the deed he would forsake and abandon her and the children. This contention is lacking in genuine ring. It smacks too much of an ingenious subterfuge to call for much activity upon the part of a court of conscience.

As to the third point there is also an irreconcilable conflict in the testimony. Mrs. Alport testified that she refused to acknowledge the deed as her free act and deed. The notary, Mr. Hock, testified that she did acknowledge the deed to be her free act and deed. There is nothing in the record that discloses anything in the least suspicious about Mr. Hock's part in the transaction. It appears from the testimony that Mr. Hock was connected with the law office of Mr. Block; that Mr. Block was acting as the attorney for Mrs. Alport in passing upon the form of the original contract and in drawing the deed which Mrs. Alport signed, and that Mr. Hock, in response to a telephone call from Mrs. Alport's daughter, came to defendant's place of business just before the deed was

signed; that after arriving there he held consultation with Mrs. Alport and her husband aside from the other persons present and advised with them as to the propriety of their signing the deed. Mrs. Alport's subsequent actions are somewhat inconsistent with her claim that she did not acknowledge the deed. She followed the money down to the bank and was there while it was being counted and deposited in a safety deposit vault. Later some of this same money was used to purchase other real estate and the title thereto was taken in her name. It does not appear that she made any protest at the bank when she saw the money being delivered by Mr. Ennis or that she made any objections when the title to the after-purchased property was taken in her name.

When the above matters are considered in connection with the fact that the testimony on the important issues presents sharp conflicts, making the credibility of the respective witnesses an important factor in determining the real facts in the matter, and the further fact that the trial judge had an opportunity of seeing and hearing the respective witnesses, we are unable to say that his finding was wrong and therefore feel no hesitancy in affirming the decree entered below.

The judgment is affirmed. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

SYDNEY G. SANDUSKY, Executor, v. JAMES M. SANDUSKY, Trustee, et al.; RODHAM ROUTT et al., Appellants.

Division Two, July 14, 1914.

1. **WILL: Trust: Gift to Church.** A gift by will to a trustee, for the "purchase, construction, furnishing, maintenance and repair" of certain parsonages and churches, and "for the general advancement of Christianity," is valid.
2. ———: **Void Clause: Residuary Estate.** Where a bequest in a will is declared void, the will is construed as though that item were not in it, and the amount thereof passes under the residuary clause.

Appeal from Clinton Circuit Court.—*Hon. A. D. Burnes*, Judge.

**AFFIRMED.**

*Claude Hardwicke* and *H. T. Herndon* for appellants; *W. M. Williams* of counsel.

As to bequest by clause 12 of the will; the will imperatively requires that a portion of the funds go to the trustee for each of the following purposes; purchase of parsonages, furnishing parsonages, maintenance of parsonages, repair of parsonages, construction of church edifices, furnishing church edifices, maintenance of church edifices, repair of church edifices, and the general advancement of Christianity; but the will does not state, nor afford any means of ascertaining, how much or what portion shall go to the trustee for each or any of said purposes; and does not authorize any court, the trustee, or anyone else, to supply the omission by determining how much or what portion shall be for each or any of said purposes. *Williams v. Kirshaw*, 5 Cl. & T. 111; *Heath v. Chapman*, 2 Drew, 417; *Chapman v. Brown*, 6 Vis. 404;



Cramp v. Playfoot, 4 K. & J. 479; Whitlock v. Am. Tract Soc., 109 Mich. 141; Tilden v. Green, 130 N. Y. 29; Lockridge v. Mace, 109 Mo. 162; Kelly v. Nichols, 21 Atl. (R. I.) 906; Andrew v. N. Y. Bib. Soc., 4 Sandf. Sup. Ct. 156; Att'y Gus v. Davies, 9 Ves. 535; Att'y Gus v. Hiuxman, 2 J. & W. 270; Lindberg v. Gwar, 6 Madd. 151; Peck v. Peck, 17 W. R. 1059; 5 Am. & Eng. Ency. Law (2 Ed.), 915. It is evident that the deceased contemplated that a portion of each fourth of the trust fund be used for the general advancement of Christianity. Such portion is not to be for the benefit of any of said religious associations and its use must not be limited to any locality or to any individuals or beneficiaries, but must be general—for the entire universe. A trust for the general advancement of Christianity could not be enforced in Missouri, especially when no one is given authority to select and limit the beneficiaries thereof, and as, by the terms of the will, an indefinite portion of the trust the testatrix attempted to create, was for that purpose, the entire bequest must fail. It is not a question whether the trustee would execute the trust properly, but can he be compelled to execute it properly, and could the court execute it if he should not. Mortu v. Bishop of Durham, 9 Ves. 99; Read v. Williams, 125 N. Y. 560. In England, a bequest for the advancement of Christianity would go to the Established Church. Atty. Gen. v. Pearsons, 3 Mer. 409. But it is not certain that a trust for the general advancement of Christianity would not be held to be void in England, as was a trust for missionary purposes, in Scott v. Browning, 9 L. R. J. 246. In the following cases, trusts have been held to be void for the reason that they could not be enforced and executed by the court, in the absence of express statutory authority therefor: Hadley v. Torsei, 203 Mo. 418; Board of Trustees v. May, 201 Mo. 360; Schmucher v. Rul, 61 Mo. 592; Bridges v. Pleasants, 4 Ind. Eq. 26; White v. Fisher, 22 Com. 31;

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Grimes Exc. v. Harmon, 35 Ind. 198; In re Fuller's Will, 44 N. W. (Wis.) 304; McHughes v. McCole, 72 N. W. (Wis.) 631; Gamble v. Triffe, 23 Atl. (Md.) 461; Moran v. Moran, 73 N. W. (Ia.) 617; Pack v. Shauhlin, 27 S. E. (W. Va.) 389; Dashiell v. Atty. Gen., 5 Har. & J. 392, 6 Mich. 1; John v. Smith, 91 Fed. 827, 65 Md. 527; Delaney v. Middleton, 72 Md. 67; Atty. Gen. v. Sonli, 28 Mich. 153; Willets v. Willets, 20 Abb. (N. C.) 471; Tilden v. Green, 130 N. Y. 29; Holland v. Peck, 37 N. C. 255; Greene v. Allen, 24 Turin, 170; Jones v. Greene, 36 S. W. 729; Bristol v. Bristol, 53 Conn. 242; Read v. Williams, 125 N. Y. 560; Greene v. Allen, 24 Tenn. 170; Pritchard v. Thompson, 95 N. Y. 76; Beckman v. Bonson, 23 N. Y. 306. Trusts not for public use are not excepted from the statute of perpetuities, and when the use is limited, as in this case, to bodies whose membership is ascertainable, it is not a public use. Re Clark's Trusts, 1 Ch. D. 497; Carner v. Long, 2 De G. F. & G. 399; Brown v. Dale, 9 Ch. D. 78; Re Dutton, 4 Ex. D. 54; Re Sheridan's Trusts, W. N. 1884, 174; Thompson v. Shakespeare, 1 De G. F. & J. 399; Brown v. Dale, 9 Ch. D. 78. In Missouri all churches are private property—church and State being independent of each other—but if such were not the case, the use in this case is so limited that it could not be deemed a public use, so the bequest must fail as to the indefinite portion intended for maintenance of parsonages and churches; and, as that portion is not ascertainable, must fail *in toto*. In the case of Moran v. Moran, 73 N. W. 617, the opinion of the court is expressed somewhat as in White v. Fiske. See also Heiss v. Murphy, 40 Wis. 276; Wilderman v. Bathy, 8 Mich. 551; Carpenter v. Miller, 3 W. Va. 174; Bridges v. Pleasants, 4 Ind. Eq. 26.

*Ralph Hughes, M. E. Lawson, Simrall & Simrall*  
and *Sandusky & Sandusky* for respondents.

(1) The statute, 43 Eliz., ch. 4, or its principles which antedated the act, and the *cy pres* doctrine obtain in Missouri. *Buchanan v. Kennard*, 234 Mo. 134; *Chambers v. St. Louis*, 29 Mo. 586; *Mo. Hist. Soc. v. Academy of Science*, 94 Mo. 467; *Lackland v. Walker*, 151 Mo. 242; *Crow ex rel. v. Clay Co.*, 196 Mo. 234; *Academy of Visit. v. Clemens*, 50 Mo. 167; *Barkley v. Donnelly*, 112 Mo. 561; *Howe v. Wilson*, 91 Mo. 49; *Strother v. Barrow*, 246 Mo. 249; *Stewart v. Coshow*, 238 Mo. 675. (4) A bequest to a trustee to support preaching of the gospel, or to erect or repair a parsonage or church edifice, is a gift for the advancement of Christianity. A bequest to a trustee for the advancement of Christianity is a gift for a charitable use and valid; the trustee may make it definite by application. The following cases bear directly upon the validity of clause 12 of will of testatrix, and in many ways pertinently illustrate the law governing this case. *Howe v. Wilson*, 91 Mo. 49; *Bishop's Res. Co. v. Hudson*, 91 Mo. 676; *Powell v. Hatch*, 100 Mo. 592; *Barkley v. Donnelly*, 112 Mo. 571; *Chambers v. St. Louis*, 29 Mo. 543; *Schmidt v. Hess*, 60 Mo. 591; *St. George's Ch. Soc. v. Branch*, 120 Mo. 239; *Strother v. Barrow*, 246 Mo. 249; *Mott v. Morris*, 249 Mo. 147; *Stewart v. Coshow*, 238 Mo. 673; *Far. & Mer. Bk. v. Longfellow*, 96 Mo. App. 392; *Miller v. Teachout*, 24 Ohio St. 525; *Saltonstall v. Sanders*, 11 Allen, 446; *Jackson v. Phillips*, 14 Allen, 552; *Going v. Emery*, 16 Pick. 119; *Hinkley v. Thatcher*, 139 Mass. 477; *Bartlett v. King*, 12 Mass. 536; *Weber v. Bryant*, 161 Mass. 400; *McAlister v. Burgess*, 161 Mass. 269; *Morville v. Fowle*, 144 Mass. 109; *Minot v. Baker*, 147 Mass. 348; *Andrews v. Andrews*, 110 Ill. 223; *Alden v. St. Peter's Parish*, 158 Ill. 631; *Trafton v. Black*, 187 Ill. 36; *Frazier v. St. Luke's Hospital*, 147 Pa. St. —; *Murphy's*

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Estate, 184 Pa. St. 310; Stevens' Estate, 200 Pa. St. 322; Tyler's Estate, 208 Pa. St. 65; Atty. Genl. v. Wallace's Devisee, 7 B. Mon. 611; Kinney v. Kinney's Ex., 86 Ky. 610; Crawford's Heirs v. Thomas, 54 S. W. (Ky.) 197; Beckwith v. St. Phillips, 69 Ga. 564; Fox v. Gibbs, 86 Me. 87; Simpson v. Welcome, 72 Me. 496; Everett v. Carr, 59 Me. 325; People ex rel. v. Cogswell, 113 Cal. 129; Am. Tract. Soc. v. Atwater, 30 Ohio St. 77; (27 A. R. 422); Mannix v. Purcell, 46 Ohio St. 102; Land Com. v. Wadhams, 11 L. R. A. (Ore.) 210; Howard v. Am. Peace Soc., 49 Me. 302; Dickson v. Montgomery, 1 Swan, 348; Carter v. Balfour's Admr., 19 Ala. 814; Bruere v. Cook, 63 N. J. Eq. 624; Trustees v. Wilkinson, 36 N. J. Eq. 141; St. James Orp. Asy. v. Shelby, 60 Neb. 796; Fay v. Howe, 136 Cal. 599; Bell v. Mercer, 14 R. I. 412; Fuller v. Griffin, 3 Vt. 401; Jones v. Habersham, 107 U. S. 174; Russell v. Allen, 107 U. S. 163; French v. Calkins, 252 Ill. 243; De Camp v. Dobbins, 31 N. J. Eq. 671; Townsend v. Carns, 3 Hare Ch. R. 257; Williams v. First Pres. Soc., 1 Ohio St. 478; In re Stewart, 26 Wash. 32; Kinike's Est., 155 Pa. St. 101. (5) As to a court of equity enforcing the rights of the beneficiaries of the trust. St. James Orp. Asy. v. Shelby, 60 Neb. 796; Moore's Heirs v. Moore's Devisees, 4 Dana, 354; Simpson v. Welcome, 72 Me. 496; Dickson v. Montgomery, 1 Swan, 348; Mannix v. Purcell, 46 Ohio St. 102; Schmidt v. Hess, 60 Mo. 595; Howe v. Wilson, 91 Mo. 45; Beckwith v. St. Phillips, 69 Ga. 564; Sappington v. Trustees, 123 Mo. 41; Miller v. Teachout, 24 Ohio St. 525; Williams v. First Presb. Soc., 1 Ohio St. 478.

ROY, C.—This is a proceeding brought by an executor to construe the will under which he is acting as such executor.

Mary E. Dorsey died September 27, 1908. Her will was duly admitted to probate. The third item of the will is as follows:

“3. I give to my executor, hereinafter named, the sum of one thousand dollars, in trust, however, for the following purposes, to-wit: To be by him loaned out on unincumbered real estate at not more than five per cent per annum, and the interest, less the necessary costs and charges, to be used by him in keeping in repair the monument erected to the memory of my late husband, John S. Dorsey, deceased, and his two wives, and, also in keeping the lot in said ‘Fairview Cemetery,’ on which said monument stands, in good condition. If at any time there should be an accumulation of interest not needed for the purposes aforesaid amounting to as much as five hundred dollars, then eighty per cent of such interest shall be paid by such trustees to the legatees or beneficiaries named in the residuary clause of this, my will, and as in said clause provided.”

The twelfth item of the will being as follows:

“12. I give, devise and bequeath, absolutely, all the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situate, to James M. Sandusky, in trust to effectuate the following benevolences and charities, to-wit:

“One-fourth thereof, primarily, for the purchase, construction, furnishing, maintenance and repair of a parsonage for the occupancy of such pastors or ministers of the gospel as may from time to time, in their ministerial capacity, serve the association of Christians in Liberty, Missouri, commonly known as ‘The Presbyterian Church of Liberty, Missouri,’ meaning thereby the congregation now worshiping in the church edifice located at the corner of Main and Mississippi streets in Liberty, Missouri, and for the construction, furnishing, maintenance and repair of a church edifice for said congregation aforesaid, commonly known as ‘The Presbyterian Church of Liberty, Missouri;’ and, secondarily for the general advancement of Christianity, said parsonage shall be known as ‘The Mary Eliz-

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abeth Dorsey Parsonage of the Presbyterian Church of Liberty, Missouri;' said charity may be executed by the trustee herein named, or by such trustee or trustees as said congregation may designate to receive said trust fund for said purposes."

Then followed in said twelfth item separate provisions in favor of the Second Baptist Church, the Methodist Episcopal Church, South, and the Christian Church, all of Liberty, Missouri, in separate clauses, the same in all respects as the clause in favor of the Presbyterian Church, including the words, "and, secondarily, for the general advancement of Christianity."

The Second Baptist Church is incorporated under the statute for the purpose of holding the title to "such real estate as may be prescribed by law for church edifices, parsonages and cemeteries."

The other churches named are not incorporated, and are represented by trustees appointed in accordance with the regulations of the several churches. All of those congregations of Christians have church edifices, and all have parsonages, except the Baptists.

There was abundance of evidence that each of those churches can make judicious use of its share of the residuary bequest in the "construction, furnishing, maintenance and repair" of its church and parsonage. The evidence shows that the net amount of the residuary estate is between twenty and twenty-five thousand dollars. The court by its decree held that the third item of the will is void, and that the \$1000 mentioned therein goes under the twelfth item into the residuary estate; and the decree upheld the twelfth item as a valid disposition of the residue.

I. It is hard to see the grounds of controversy in this case. The disposition of the residuary estate un-

**Will: Trusts:  
Gift for Church.**

der the twelfth item of the will is clearly within the lines laid down by the decisions of this court. A gift to repair or build a church is a gift to charitable uses. [St. George's Church Soc. v. Branch, 120 Mo. 226.] A gift for a parsonage is a charity. [Bishop's Residence Co. v. Hudson, 91 Mo. 671.] Gifts for a pious or charitable use are favored by the law. [Strother v. Barrow, 246 Mo. 1. c. 250.]

The provision for the "general advancement of Christianity" does not avoid the bequest. A trustee is provided for who shall determine the particulars as to the application of the fund. *Id certum est quod certum reddi potest.* [Howe v. Wilson, 91 Mo. 45.]

It is vain to say that the church corporation is not authorized by law to hold title to the trust fund. That fund while it remains such, and before it is expended on the church edifice or parsonage, is in the keeping of the trustee. After any part of it is used in constructing, furnishing, maintaining or repairing the church edifice or parsonage, the corporation will be competent, under the law of its existence, to hold the title to such church edifice and parsonage.

II. The trial court adjudged the third item of the will void. There is no appeal by the executor from that decision. The trial court also adjudged that the \$1000 mentioned in that item is a part of the residuary estate disposed of by the twelfth item. That ruling was correct. The bequest of the \$1000 under the third item being void, the will is to be construed as though the third item were not in it. In that event the \$1000 becomes a part of the residuum.

**Void Clause:  
Residuary  
Estate.**

The judgment is affirmed. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

## ROBERT ABELES, Appellant, v. E. M. PILLMAN.

Division Two, July 14, 1914.

1. **LIMITATIONS: Thirty-one Year Statute: Lawful Possession: Color of Title.** It is not reasonable to presume the defendant, who interposed the thirty-one year Statute of Limitations, held possession in good faith under a deed to her devisor concerning which the evidence does not show she had knowledge; and the trial court's finding that said defendant gained lawful possession from such deed was accordingly erroneous.
2. ———: ———: ———: ———: **Ownership.** The term "lawful possession" used in the thirty-one year Statute of Limitations (R. S. 1909, sec. 1884) does not mean possession based upon ownership of the title to the land—this for the reason that the statute contemplates that the "lawful possession" shall continue for a year after the thirty-year period before the one so having lawful possession becomes *ipso facto* vested with the title of the claimant. It therefore follows that the person in lawful possession must be some one other than the owner.
3. ———: ———: ———: **What is.** Color of title is not necessary to establish "lawful possession" under the thirty-one year Statute of Limitations.
4. ———: ———: ———: **Special Findings: New Trial.** Where in ejectment the defendant asserted title to land under the thirty-one year Statute of Limitations, and the court found specially that, since he had color of title, said defendant was in "lawful possession," but it appears upon appeal that the evidence does not support the finding of color of title, the case is reversed and remanded for a new trial, in the course of which evidence may be introduced upon the question whether or not defendant's possession was of such character as to be lawful, under the statute, without color of title.
5. ———: ———: ———: **No Assessment of Taxes: Non-resident Owner.** Where a defendant in ejectment asserts title to the land under the thirty-one year Statute of Limitations (R. S. 1909, sec. 1884), one requirement of which is that neither the plaintiff nor those under whom he claims shall have paid any taxes on the land for thirty years, the plaintiff will not be excused, no taxes having been paid, by a showing that the record owner was not a resident of the State and that the land was never assessed for taxes, said owner having testified that he had made no inquiry about the land and thought it worthless.



Appeal from St. Louis County Circuit Court.—*Hon. G. A. Wurdeman*, Judge.

REVERSED AND REMANDED.

*Andrew M. Sullivan* and *C. C. Bland* for appellant.

(1) If the deed from Greeley to L. F. Pillman is a forgery, as the trial judge found it to be, then the defendant by reason of her mutual relationship to L. F. Pillman, in respect to the lands, is, as would have been her devisor if he had been defendant in her stead, estopped to assert title in or lawful possession of the lands by virtue of the forged deed. *Day v. Graham*, 97 Mo. 398; *Henderson v. Henderson*, 13 Mo. 151; *Tratam v. Rogers*, 34 N. Y. Supp. 836; *Crispen v. Hannavan*, 50 Mo. 415; *Subway Co. v. St. Louis*, 140 Mo. 551; *Henry v. Woods*, 77 Mo. 271; *Mygall v. Coe*, 124 N. Y. 212; *Tiedeman on Real Property*, sec. 731, p. 690; *Boniti v. Brown*, 69 S. E. (N. C.) 614. (2) The defendant is not a bona-fide purchaser, but a mere volunteer, and her possession is not lawful within the meaning of the thirty-year Statute of Limitations. *Young v. Scofield*, 132 Mo. 650; *Day v. Graham*, 97 Mo. 398; *Jones v. Sanders*, 87 Mo. 557; *Abraham v. Bender*, 44 Mo. 560; *Henry v. Wood*, 77 Mo. 581. (3) If L. F. Pillman intended to claim the land or its possession under the forged deed, then his possession was fraudulent and unlawful. If he did not claim under the forged deed, his possession was that of a mere intruder or trespasser, and was unlawful. *Searl v. School District*, 133 U. S. 553; *Mansfield v. Ballard*, 74 Mo. 185; *Collins v. Pease*, 146 Mo. 135; *Long v. Coal & Iron Co.*, 233 Mo. 740. (4) The failure of the proper officials to assess and levy taxes on the lands furnishes a non-resident owner of such lands a valid excuse for the non-payment of

taxes thereon, and Sec. 1884, R. S. 1909, does not apply. *Harper v. Meyer*, 117 Cal. 60; *Dressner v. Nelson*, 138 Cal. 394; *Swank v. Irrigation & Power Co.*, 15 Idaho, 353; *Weisner v. Chamberlain*, 117 Ill. 56; *Railroad v. Forsyth*, 118 Ill. 277.

*John A. Watson* and *A. E. L. Gardner* for respondent; *Perry S. Rader* and *E. P. Mann* of counsel.

(1) Defendant's possession was lawful for one whole year after the expiration of the thirty-year period during which Greeley paid no taxes nor was in possession. *Collins v. Pease*, 146 Mo. 139; *Shumate v. Snyder*, 140 Mo. 84; *Swope v. Ward*, 185 Mo. 316. Under the ten-year Statute of Limitations, actual adverse possession for ten consecutive years, under a claim of ownership, makes the possession lawful, and vests the title in the possessor, even though he was originally a mere intruder or trespasser. *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 604; *Smith v. McCorkle*, 105 Mo. 141; *Craig v. Cartwright*, 65 Tex. 424; *Link v. Bland*, 43 Tex. Civ. App. 520; *Wood v. Railroad*, 11 Kan. 324; *Quick v. Rufe*, 164 Mo. 412; *Mather v. Walsh*, 107 Mo. 132; *Franklin v. Cunningham*, 187 Mo. 196; *Scannell v. Soda Fountain Co.*, 161 Mo. 618; *Warren v. Bowdran*, 156 Mass. 280. Accepting as correct the definition of "lawful possession" as given in *Collins v. Pease*, 146 Mo. 139, namely, that "one is in 'lawful possession' within the meaning of the act [Sec. 1884] when he has not entered as a mere intruder or trespasser, but in good faith, claiming to be the owner," then defendant was unquestionably in lawful possession, not only for one year after the expiration of the thirty-year period, but for more than six years. She did "not enter" upon the land "as a mere intruder or trespasser." Her husband had been in possession for eighteen years, claiming to be the owner, and she testifies that "he owned it" and

her son Fred that "he always claimed to own it." He was in possession when he died, and by his will he devised the land to her, and she continued without interruption the possession he had and enlarged it by erecting the sand screen. She honestly believed he was the owner, and that in consequence by his will she had become the owner. She did not, therefore, enter "as a mere intruder or trespasser." And she began and continued in possession "in good faith, claiming to be the owner." He had been in possession, claiming to be the owner, for eighteen years, and for at least five years his possession had been peaceable and undisputed by any one. She thought his will gave her a right to continue his possession and to claim to be the owner, and in that belief, honestly and in good faith, she maintained possession for more than six years, continuing to buy and stack ties on the land, and to move sand and gravel from it, and built a sand screen house, and paid taxes on what she thought was the land, which of itself was evidence of claim of ownership. Her possession, therefore, was "lawful," and it was for more than one year after the thirty-year period had expired. Certainly these facts are substantial enough to justify the trial court, sitting as a jury, to find, as a fact, that defendant's possession was lawful. (2) This court has never held that to constitute lawful possession color of title in the possessor is necessary. We have examined, one by one, every case in which title was claimed under section 1884, and in not one of them was it said that color of title is necessary as a basis for "lawful possession." Those cases are as follows: *Dunnington v. Hudson*, 217 Mo. 93; *Campbell v. Greer*, 209 Mo. 199; *Haarstick v. Gabriel*, 200 Mo. 243; *DeHarte v. Edmonds*, 200 Mo. 246; *Crain v. Peterman*, 200 Mo. 295; *Collins v. Pease*, 146 Mo. 135; *Fairbanks v. Long*, 91 Mo. 628; *Mansfield v. Pollock*, 74 Mo. 185; *Rollins v. McIntire*, 87 Mo. 497; *Shumate v. Snyder*, 140 Mo. 77; *Howell*

v. Jump, 140 Mo. 442; Pharis v. Bayless, 122 Mo. 116; Weir v. Lumber Co., 186 Mo. 392; Chilton v. Comonianni, 221 Mo. 685; Long v. Coal and Iron Co., 233 Mo. 727; Cousins v. White, 246 Mo. 307.

WILLIAMS, C.—This is a suit in ejectment to recover possession of two irregular strips of land lying in the southwest fractional quarter of section 13, township 37, range 10, west, Phelps county, Missouri. The suit originated in the Phelps County Circuit Court but upon change of venue was sent to the circuit court of St. Louis county where trial was had before the court without a jury, resulting in a judgment for the defendant. The petition was in the usual form. The answer contained a general denial but admitted that the defendant was in possession of the land. The answer also pleaded the ten-year and the thirty-one year Statutes of Limitations. The reply put in issue the pleas of the Statutes of Limitations, admitted that neither plaintiff nor those under whom he claimed had paid any taxes on the land, but alleged as an excuse therefor that the land had never been assessed for taxation. The land in question lies between the eastern city limits of the town of Jerome and the Gasconade River. The two strips are separated by the right of way of the St. Louis & San Francisco Railroad, which runs north and south. One of the strips of land adjoins the railroad's right of way on the west and lies between the right of way and the Main street in Jerome and is referred to as the "tie yard." The other strip lies east of the railroad right of way and extends from the right of way to the west bank of the Gasconade river. The two strips of land are approximately two thousand feet long. The tie yard strip varies in width from ninety to one hundred and fifty feet, the river strip is about three hundred feet wide for half way of its length, then it narrows down abruptly to a few feet in width.

In 1866, one William F. Greeley made a cash entry of the quarter section in which the land in question is located and on August 15, 1870, received a patent therefor. During the years of 1867 and 1868 said Greeley conveyed the above mentioned right of way to the railroad company and conveyed about six acres of the quarter section to a mill company and on the western portion of the quarter section established the town of Jerome, making a plat thereof showing the blocks, lots, streets and alleys. This left undisposed of the two strips of land now in controversy. On March 26, 1910, said Greeley, by a quitclaim deed, conveyed all of his right, title and interest in and to the land now in controversy to the plaintiff herein, and a short time thereafter this suit was instituted. Plaintiff introduced in evidence the patent from the United States to William F. Greeley and the above mentioned quitclaim deed from said Greeley to the plaintiff herein, and offered evidence tending to show that the monthly rents and profits of the two strips of land were about seventy-five dollars. The evidence on the part of the defendant tended to show that she was the widow of Louis F. Pillman, deceased; that her husband died in December, 1903, leaving a will whereby he devised to defendant, for life, all his real estate. The will does not attempt to describe any of testator's real estate. In 1883, said Louis F. Pillman became a resident of the town of Arlington, which is on the east side of the Gasconade River and about one-half mile from the town of Jerome. From the time said Pillman moved to Arlington until his death in 1903, with the exception of two or three years beginning with 1889 and a further period of about one year beginning about 1896, he was engaged in dealing in railroad ties and the shipping of sand and gravel both at Arlington and at Jerome. The ties which he purchased would be floated down the Gasconade River in rafts and would be landed on the river strip where

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they would be taken by said Pillman and hauled across the river strip and on to the west strip known as the tie yard. These ties would be stacked upon the tie yard strip until they were inspected by the railroad inspector and then they would be placed upon cars and shipped out. At times the tie yard strip would be practically covered with ties and at other times only a few culls would be located thereon. The number of ties handled varied in number from one hundred thousand to two hundred thousand per year. During this time said Pillman loaded sand from the river strip. The sand would be deposited on the river strip about once a year, during high water, and then Pillman would haul sand away until the supply was exhausted and would then wait until another deposit was made before moving more sand. During the time said Pullman continued the sand and tie business he exercised exclusive rights of ownership over the two strips of ground, denying to others the right to use the same. Defendant's evidence also tends to show that during the time that Pillman continued the tie and sand business on this ground he claimed to own the ground. Defendant offered in evidence an instrument purporting to be a quitclaim deed conveying the land here in controversy to L. F. Pillman, executed and acknowledged by "William F. Greely" at the city of St. Louis, January 12, 1903, and recorded in Phelps county, Missouri, August 10, 1909 (the evidence tends to show, and the court found, that this deed was a forgery). The evidence tends to show that four or five years after the death of said L. F. Pillman this deed was either handed or mailed, by deceased's attorney, to John H. Pillman, a son of defendant, and L. F. Pillman, the grantee named in said deed. It appears that at the time of L. F. Pillman's death said attorney was attending to his legal business, and at the time of Pillman's death had possession of his will and some other documents belonging to said Pillman.

J. H. Pillman, the person who received from the attorney the above mentioned deed, had never heard of the deed prior to its delivery to him. Upon receiving the deeds, said J. H. Pillman had the same placed of record. The record does not disclose how the attorney got possession of the deed, neither is there any direct evidence that said Pillman, the grantee in said deed, had ever had possession of the deed or knew of it. Defendant testified that her husband used this land all the time that he was in the sand and tie business; that he hauled gravel and sand from the river strip and hauled the ties from the river, across the river strip, and piled them upon the tie yard strip; that she never heard anyone else claim to own the land during all the time they were there and that no one else was in possession of or used or claimed to own the land during any of the time that her husband occupied it. Upon cross-examination, she testified her son, Fred, since the death of her husband, looked after her business and she did not know whether any taxes had been paid on the land or not and that she did not know whether her husband ever paid any taxes on the land or not. The following occurred during her cross-examination: "Q. Did you ever know W. F. Greeley? A. No, sir. Q. You say you never heard of Greeley; I will ask you if after your husband's death you found a quitclaim deed purporting to be from W. F. Greeley to your husband for this strip of land, dated about January 12, 1903? A. I don't remember of any of that kind; I don't look after things of that kind."

After the death of defendant's husband, defendant's two sons, with her consent, continued to occupy the land and carried on the tie and sand business thereon in very much the same manner as it was conducted prior to their father's death. Defendant's possession, in this manner, was continued up until the time that this suit was instituted. The land was never fenced nor improved in any manner excepting that,

about two years prior to the institution of this suit, defendant's two sons built a sand screen, costing about fourteen hundred dollars, on the tie-yard strip.

The deposition of William F. Greeley was taken in the city of Boston, Massachusetts, on April 20, 1910. The cross-examination contained in this deposition was offered in evidence by defendant and the direct examination was offered in evidence by the plaintiff. Greeley testified that, at the time of the taking of his deposition, he was seventy-nine years old; that in 1865 he was an army officer in the regular army of the United States, stationed in Springfield, Missouri, as a mustering officer, mustering out troops at the close of the war; that he resigned in May, 1865, and located at Rolla, Missouri, where he engaged in business; that about 1867 he made an entry of the quarter section of land on the Gasconade River and laid out the town of Jerome; that he lived in Jerome for a time and left there in the fall of 1869; that he never resided in Phelps county, Missouri, after 1869; that he never paid any taxes on the land and did not know who had had possession of the land; that he never did anything with the land after 1869, other than to make the quitclaim deed to plaintiff in 1910; that after leaving Phelps county, Missouri, he went to Marshfield, Missouri, and from there to Wichita, Kansas, where he remained about two years, and then to St. Louis where he remained about six months; that he first went to Boston to reside in 1880, but did not live there continuously; that in 1900 he returned to Boston and had lived there since that time and had not been out of New England since 1900; that he was not in St. Louis in 1903 and was not acquainted with L. F. Pillman and did not make the deed to L. F. Pillman in 1903 or any other time; that he executed the quitclaim deed to plaintiff for a consideration of one hundred dollars; that in 1910 an attorney called on him and asked him if he would make a quitclaim deed to the interest



that he owned in the land in question; that he did not want to make a warranty deed because he did not know whether the land had been sold for taxes or not; that he had known for forty years that he owned the property in Phelps County, Missouri, but never thought enough about it to have the taxes paid on it and "didn't think it was worth five cents."

Plaintiff's evidence in rebuttal tended to show that during the time that Pillman was engaged in the sand and tie business at Jerome, he did not claim to own the land. One witness testified that about sixteen years ago he heard Pillman say that he would like to own the land and another witness testified that Pillman claimed that he had a lease on the land. The clerk of the county court of Phelps county testified that he had recently made an examination of the old tax books to ascertain whether or not this land had ever been assessed for taxation. He testified that the two strips never appeared upon the tax books by their exact descriptions. He found that in 1879 and 1880 the fractional east half of the southwest quarter was assessed to Milton Santee (the two strips in controversy are embraced within the east half of said quarter section). In the year 1881, sixty-eight and eighty-nine one-hundredths acres of the east half of said quarter section were assessed as unknown. In 1882, forty-eight and eighty-nine one-hundredths acres of the fractional east half of said quarter section were assessed to Milton Santee and fifty-six acres of the east part of said quarter section were assessed to James Carney. In 1883, forty-eight and eighty-nine one-hundredths acres of the fractional east half of this quarter section were assessed to Milton Santee. In 1885, 1886 and 1887, fifty-eight and eighty-nine one hundredths acres of the fractional east half of this quarter section were assessed to Milton Santee. In 1905, four acres (undescribed) of this quarter section and west of the Gasconade River were assessed in the

name of, and the taxes paid by, this defendant. In the years 1906 and 1907, apparently the same four acres were assessed in the name of James Carney and the taxes paid by this defendant. For the years 1908 and 1909, said four acres were assessed to defendant and the taxes were paid by her and these four acres were assessed to defendant in 1910. This witness also testified that William F. Greeley had never paid any taxes on any portion of this quarter section of land. The court made a finding of facts in which it found that the land in question was patented to one William F. Greeley and that on March 26, 1910, said Greeley executed a quitclaim deed purporting to convey said land to the plaintiff herein; that said Greeley never paid any taxes on said land and that none were ever levied thereon; that the rental value of the land is \$75 per month; that while L. F. Pillman occupied said land he absolutely prevented others from using it and to some persons he claimed he owned the land and to others he claimed that he had the yard leased; that said Greeley never appeared at Jerome or made any claim to said land since 1870, and that defendant was in possession of the land at the time this suit was brought and has been in said possession since the death of her husband, who died testate, leaving defendant as his beneficiary, in 1903; that the quitclaim deed, dated January 12, 1903, purporting to be executed by William F. Greeley to L. F. Pillman, was a forgery; that the possession of said land by deceased Pillman was not hostile nor adverse to the title of said Greeley and was therefore not sufficient to invoke the ten-year Statute of Limitations. The court found, however, that the defendant was entitled to invoke the thirty-one year Statute of Limitations and in support of that defense found the following facts: That Greeley never had the actual possession of the land at any time and never paid any

taxes thereon; that plaintiff failed to bring his action within one year after the thirty-year period, in which plaintiff and those under whom he claims were out of possession; and that the title had emanated from the Government more than ten years prior to the commencement of this suit. The court intimates that the close question in the case is whether or not the defendant was in "lawful possession," at any time, for one year after the termination of the thirty-year period. With reference to that point the court makes the following finding of facts:

"The petition alleges that she was in possession at the date of the institution of this suit, and the possession she held that date was the possession of the date when the forged deed to her deceased husband was put on record. And now arises the only decisive question in the case. Was the possession of the defendant in this forged deed sufficient to make her possession lawful? There is no doubt that defendant and her son believed the deed to their ancestor to be a proper, valid and genuine deed, otherwise they would have been slow to put it upon record. It is clear that thereupon the defendant held possession under a deed that she thought was genuine, but was in fact a forgery. 'Generally it may be said that any writing which purports to convey the title to land by appropriate words of transfer, and describes the land, is color of title, though the writing is invalid, *actually void* and conveys no title.' [Dunnington v. Hudson, 217 Mo. l. c. 100.]

"Of course, this deed conveyed nothing and no interest in the land was acquired by it, but being recorded by the defendant and the land held by her under it, in good faith, for several years before the institution of this case, she, in my opinion, had sufficient color of title to warrant her possession to be 'lawful,' and for the reasons above set forth the judgment will be for the defendant."

The court thereupon rendered judgment, finding the issues for the defendant, and the plaintiff perfected an appeal to this court.

The court found in favor of appellant and against the claim of respondent with reference to the defense that plaintiff's action was barred by the ten-year Statute of Limitations. The question as to the bar of the ten-year Statute of Limitations need not therefore be here discussed.

The court found for defendant on the theory that plaintiff's cause of action was barred by the thirty-one-year Statute of Limitations (Sec. 1884, R. S. 1909), and it is with reference to points urged by appellant against the action of the court in this regard that the appellate review is concerned.

I. With reference to the defense of the thirty-one-year Statute of Limitations, the court found the following facts: (1) That neither plaintiff nor those under whom he claimed  
**Limitations:**  
**Thirty-one**  
**Year Statute:**  
**Color of Title:**  
**Evidence.**  
had been in the actual possession of the land or paid any taxes thereon at any time since 1870 (which was more than thirty-one years before the commencement of this suit); (2) that the title had emanated from the Government more than ten years; (3) that plaintiff failed to bring his action within the thirty-first year. There was substantial evidence to support the foregoing finding of facts. But in order that the defense of said Statute of Limitations might be available to defendant, it was necessary that one additional fact be found, to-wit, that after the expiration of said above mentioned thirty-year period and before the institution of this suit, defendant must have been in the *lawful possession* of said land for one year. [Fairbanks v. Long,

91 Mo. 628, l. c. 633; Collins v. Pease, 146 Mo. 135, l. c. 140.] The question as to whether defendant had been in *lawful possession* for one year is, as declared by the trial court and shown by the record, the most important question in the case. In this regard, the court found that defendant held possession under the forged deed from said Greeley to her deceased husband; that defendant believed this deed to be a valid and genuine deed and that she in good faith held under said deed for several years before the institution of this suit, and that said deed constituted color of title and made her possession lawful within the meaning of said statute. Appellant contends that the court erred in the above finding of facts and in the conclusion of law with reference to said deed constituting color of title. We have very carefully examined the evidence and agree with appellant's contention that the court erred in the above finding of facts for the following reasons: The evidence fails to show that defendant ever claimed under or by virtue of said forged deed. The evidence shows that whatever possession defendant held, was entered into by her a short time after her husband's death. The deed was not discovered until four or five years after the death of her husband, when it was given by an attorney to defendant's son and by him filed for record and so far as the evidence shows without her knowledge. Defendant testified that she did not remember anything about the deed, and there was no evidence to show that she ever heard of the deed until after this suit was instituted. The son who received the deed from the attorney was named one of the devisees of the remainder interest in testator's real estate and for aught that appears in the testimony he was acting for himself when he had the deed recorded. It is not reasonable to presume that defendant claimed or held possession in good faith under a deed about which she had no knowledge. That being true, the finding

of fact by the court that she, in good faith, claimed under and held possession by virtue of said deed as color of title was erroneous because there is no evidence to support said finding. In determining the character of *her* possession therefore the situation must be viewed as though the forged deed had never been in existence, and it is therefore unnecessary to a decision of the case to determine what effect, if any, said forged deed would have as color of title had the evidence shown that she in good faith claimed and held possession under or by virtue of the same.

II. Appellant contends that "lawful possession" as used in said statute cannot exist in the absence of color of title in the possessor. Respondent contends that the possessor need not claim under color of title. This necessitates a discussion of the term "lawful possession" as used in said Statute of Limitations. The statute is as follows:

**Lawful Possession:**  
**Color of Title.**

"Sec. 1884. Limitation in case of certain titles. Whenever any real estate, the equitable title to which shall have emanated from the government more than ten years, shall thereafter, on any date, be in the lawful possession of any person, and which shall or might be claimed by another, and which shall not at such date have been in possession of the said person claiming or who might claim the same, or of any one under whom he claims or might claim, for thirty consecutive years, and on which neither the said person claiming or who might claim the same nor those under whom he claims or might claim has paid any taxes for all that period of time, the said person claiming or who might claim such real estate shall, within one year from said date, bring his action to recover the same, and in default thereof he shall be forever barred, and his right and title shall, *ipso facto*, vest in such possessor: *Provided, however*, that in all cases such

action may be brought at any time within one year from the date at which this section takes effect and goes into force."

It becomes at once apparent that the term "lawful possession" as used in the statute does not mean possession based upon ownership of the title to the land—this for the reason that the statute contemplates that the "lawful possession" shall continue for a year after the thirty-year period (*Fairbanks v. Long*, *supra*; *Collins v. Pease*, *supra*) before the one so having lawful possession becomes *ipso facto* vested with the title of the claimant. It therefore follows that the person in "lawful possession" must be some one other than the owner.

In the case of *Collins v. Pease*, 146 Mo. 135, WILLIAMS, J., in discussing the question said: "One is in 'lawful possession' within the meaning of the act when he has not entered as a mere intruder or trespasser, but in good faith, claiming to be the owner." In the foregoing definition the phrase "a mere intruder or trespasser" is evidently used as synonymous with the opposite meaning of the phrase "(one who enters) in good faith, claiming to be the owner" and therefore means a person entering into possession when he does not in good faith believe himself to be the owner. So that the definition announced in the case of *Collins v. Pease*, *supra*, when reduced to its last analysis simply means that one is in the lawful possession within the meaning of said statute when he enters into possession claiming to own the same and in good faith believing that he is the owner. Is then color of title a prerequisite to the lawful possession? It is true that in perhaps all the cases involving the application of this statute, the possession was claimed under color of title. This is quite naturally so since the great majority of persons who go into possession of land in good faith claiming to own the same do so under a deed or instrument purport-

ing to convey the title. But while this is true, we are not aware that it has ever been expressly held in any of those cases that lawful possession could not exist in the absence of color of title in the possessor.

“The term [color of title] implies that a valid title has not passed.” [1 R. C. L. 707.]

In cases of this kind, color of title at most could be nothing more than the *evidential basis* of good faith, or *evidence* from which good faith might be presumed or inferred or the territorial extent of the possession ascertained. The rule announced in the case of *Collins v. Pease*, *supra*, only states the ultimate facts which must be proved, e. g., possession in good faith under claim of ownership, and does not in any manner limit the proof by which those ultimate facts may be shown. No reason appears why the ultimate fact should be proved in any particular way or by any special brand of evidence, and it therefore follows that those facts may be shown by any competent evidence possessing the necessary probative force or value. Respondent in her brief contends that the evidence does show that defendant in good faith entered into possession of this land claiming to own the same as devisee under her husband's will; that she believed her husband to be the owner of the land, and that she became the owner of a life estate in said land as devisee under the will, and that so believing and claiming she entered into the possession of the same upon the death of her husband and continued in such possession until this suit was instituted and was therefore in the lawful possession of the land for more than one year after the said thirty-year period and before the institution of this suit. There was evidence tending to support the above claim of respondent, but the evidence is not uncontradicted. There was a conflict in the evidence as to whether defendant's husband claimed to own the land. There is also conflict in the evidence as to the extent of her



actual possession, if color of title is absent. This being an action at law, it was the peculiar function of the jury, or the trial court sitting as a jury, to find the facts. "It was the province of the trial court sitting as a jury to weigh the evidence and determine the real facts of the matter. This duty this court cannot usurp." [Slicer v. Owens, 241 Mo. 319, l. c. 323.] This is not a case where the trial court found the issues generally for the defendant, and where there being sufficient evidence to justify

**Special Findings.**

said general finding, we would presume that he found the necessary facts upon which to base the judgment. Here the record shows the specific facts found by the court, which, as above stated, were unsupported by the evidence. The court made no finding of facts upon the theory now advanced by respondent. Appellant is entitled to have these issues of fact passed upon and determined by the trial court, and hence the case must necessarily be reversed and remanded for new trial. It is impossible to foresee what the evidence will be upon retrial, and therefore it would serve no useful purpose to discuss the weight and effect of the present evidence, as showing good faith, extent of possession, etc. We would suggest, however, that the present evidence is not very definite with reference to the exact extent or limits of the defendant's possession if she is not to be aided in that regard by constructive possession arising out of a claim under color of title, as provided by section 1882, Revised Statutes 1909.

III. Appellant further contends that the land was never assessed for taxes and that since the record owner was a non-resident of the State this excused the non-payment of taxes. It will be noticed that the statute makes no exception in this regard. All the showing that the statute requires in this regard is that

**No Assessment of Taxes:  
Non-resident Owner.**

neither the claimant nor those under whom he claims or might claim have paid any taxes for thirty years. This was shown in the present case. Whether or not an excuse might arise if it should appear that the claimant or those under whom he claims, after some effort upon their part and by matters over which they had no control, were prevented from making payment of taxes because none were assessed, we need not now determine, because such a situation is not here involved and it would indeed be a rare occasion where the owner would have any difficulty in having his land assessed after calling it to the attention of the proper officials.

Here the person who owned the title during all the thirty-year period testified that he did not care enough about the land to even make any inquiry about it, and that he did not undertake to pay any taxes on the land because he thought the land was not worth "five cents." Under such conditions the failure of the officials to properly assess the land should not operate to exempt him or his grantee from the bar of the statute.

In support of his above contention appellant cites the following cases: *Harvey v. Meyer*, 117 Cal. 60; *Dierssen v. Nelson*, 138 Cal. 394; *Swank v. S. I. & P. Co.*, 15 Idaho, 353; *Wisner v. Chamberlin*, 117 Ill. 568, and *Peoria, D. & E. R. R. Co. v. Forsyth*, 118 Ill. 272. But an examination of those authorities will disclose that they are based upon statutes which require that the party who claims title by adverse possession for the required statutory time must show that he has paid all taxes "which have been *levied* and *assessed* upon such land" or which have been "legally assessed" against such land during the time of his adverse possession. It is therefore apparent that the respective holdings in those cases would not be authorities in point in the present case.

For the reasons given in paragraphs one and two above the judgment is reversed and the cause remanded. *Roy, C.*, concurs in result.

**PER CURIAM.**—The foregoing opinion of *WILLIAMS, C.*, is adopted as the opinion of the court.

*Walker, P. J.*, and *Brown, J.*, concur, *Faris, J.*, concurs in result.

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CATHERINE MCKEE et al., Plaintiffs in Error, v.  
ARTHUR DONNER et al.

Division Two, July 14, 1914.

**APPEAL: Bill of Exceptions: Motion for New Trial: Record Proper.** Where the correct bill of exceptions does not contain plaintiffs' motion for new trial or any call for it, appellate review must be limited to the record proper, and where that is free from error the judgment will be affirmed. [See *Haggerty v. Ruth*, 259 Mo. 221.]

Error to Butler Circuit Court.—*Hon. J. C. Sheppard*, Judge.

**AFFIRMED.**

*E. R. Lentz* for plaintiffs in error.

*L. F. Dinning* and *Lew R. Thomason* for defendants in error.

**WILLIAMS, C.**—This is an action to quiet title to real estate. Trial was had in the circuit court of Butler county, resulting in a decree for defendants. Plaintiffs bring the case here by writ of error. Defendants in error insist that the appellate review must be limited to the record proper on

**Bill of Exceptions:  
Motion for  
New Trial.**

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Holzemer v. Met. St. Ry. Co.

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the ground that the correct bill of exceptions does not contain plaintiffs' motion for new trial, nor any call for said motion. Upon an examination, we find that defendants' claim is correct. The situation of the record in this case is identical with that discussed in the recent case of Haggerty v. Ruth, 259 Mo. 221, delivered by this Division. The record proper appears to be free from error and for the reason stated in the opinion in the above mentioned case the judgment is affirmed. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

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FRANK HOLZEMER v. METROPOLITAN  
STREET RAILWAY COMPANY, Appellant.

Division Two, July 14, 1914.

1. NEGLIGENCE: Street Railways: Instructions: Applicable to Issues: Going Into Danger. Where the allegation of negligence in the petition, especially when given the liberal construction to which it is entitled after verdict, is wide enough to embrace the meaning that plaintiff was moving toward the fixed path of defendant's cable car under such circumstances as would cause him to be struck if the gripman did not do certain things about the operation of the car, or give warning of its approach, an instruction which used, as regards the plaintiff's acts, the phrase "going into" a situation of danger, as well as the phrase "in such situation," does not enlarge the issues framed by the petition, and, furthermore, defendant should not be heard to complain in that regard on appeal, after having adopted practically the same theory in one of its own instructions.
2. ———: ———: ———: Going Into Danger: Duty of Gripman. Where the evidence shows that plaintiff, at a street crossing, started southeastwardly across the parallel tracks of defendant's cable railway, and thus unwittingly turned his back somewhat toward an eastbound car which struck him

after he had crossed the north track, on which a westbound car also was approaching, and from the time he started to cross the tracks the gripman by the use of ordinary care could have seen him, it cannot be said that an instruction that it was the gripman's duty to act when he saw or could have seen the plaintiff going into a situation of danger was erroneous because not supported by the evidence.

3. ———: ———: **Going into Danger: Warning: Question for Jury.** Evidence in an action for damages by one run down by a cable car *held* to show that by the exercise of ordinary care the gripman could have seen plaintiff's danger in time to warn him; and accordingly it was for the jury to say whether the giving of an alarm would have aided in preventing the injury.
4. ———: ———: ———: **Instructions: Duty of Gripman: Presumptions.** Where plaintiff, in plain view (whether seen or not) of the gripman on defendant's eastbound cable car, and unaware of its approach, started to walk diagonally across the tracks at a street crossing while a westbound car also was drawing near, and did in fact cross the north track and get well upon the south track before he was struck and injured by the eastbound car, an instruction was rightly refused which told the jury that even though the gripman saw the plaintiff approaching the track, yet under the law he had the right to assume that plaintiff would stop before he went upon the track, and that the gripman was not required to check or stop the car until there was danger of a collision.
5. **INSTRUCTIONS: Refused: Points Already Covered.** The refusal of instructions requested on points covered by instructions already given is not error.
6. **EVIDENCE: Hypothetical Question: Objection: Appeal.** Appellant's contention that the trial court erred in permitting a physician to answer a hypothetical question which appellant asserts was not based upon all the facts shown by the evidence will not be considered on appeal where it appears that that ground of impropriety was not contained in the objection made at the trial.
7. ———: **Extent of Injuries: Stone Taken from Plaintiff's Face.** Where the extent of plaintiff's injuries was one of the issues in the case, which was tried about two years after the injury complained of, a stone which a witness claimed he took from plaintiff's face immediately after the accident was properly received in evidence. From it the jury could get a more accurate impression of the original extent of the injuries to plaintiff's face.

8. ———: **Experiments: Preliminary Proof: Causal Conditions.** Before experiments and their results are admissible as proof it must first be shown that causal conditions and circumstances were reproduced substantially as at the original happening.
9. ———: **Excluded: Offer of Proof: Appeal.** In order to have the admissibility of excluded evidence considered on appeal the party complaining must have made an offer of proof when objections to the questions were sustained.
10. **APPEAL: Credibility of Witnesses: Taking Case from Jury.** The credibility of the witnesses is for the jury, and where in a personal injury action the jury found for plaintiff, whose case was supported by proof, and the court in overruling defendant's motion for a new trial passed upon the weight of the evidence, the defendant cannot upon appeal successfully maintain a contention that the case should have been taken from the jury for failure of proof because, defendant asserts, plaintiff's principal witness showed by his own testimony that he was unworthy of belief.
11. **NEGLIGENCE: Damages: Excessive Verdict.** Where a boiler-maker 57 years old and in good health, earning over \$100 a month, was struck by defendant's cable car, with the result that his nose was broken, his right forearm broken in two places, his skull fractured, his spinal column injured so that five vertebrae have grown together, and until the time of the trial, two years after the accident, although he "did not look sickly," he had been able to do no work and suffered from partial paralysis of his tongue and of the right side of his face, it is held that an award of \$15,000 damages was excessive by \$3000.

Appeal from Jackson Circuit Court.—*Hon. Herman Brumback*, Judge.

**AFFIRMED** (*conditionally*).

*John H. Lucas* and *C. S. Palmer* for appellant.

(1) Plaintiff's first instruction was erroneous for two reasons: (a) Because it enlarged the issues framed by the petition; (b) because it was not justified by the evidence. The petition charged that it was the duty of the gripman to act when he saw the plaintiff in a situation where he was liable to be run into.

The instruction told the jury it was his duty to act when he saw or could have seen plaintiff "going into a situation," etc. There was no evidence that the gripman could have seen the plaintiff going into a situation of danger until the very instant that he was in danger. There was no evidence that any warning could have been given which might have avoided the accident, and the whole record shows that there was nothing to indicate the necessity of a warning until plaintiff was on the track and that it would then have been unavailing. *Heinzle v. Railroad*, 182 Mo. 528; *Christian v. Insurance Co.*, 143 Mo. 469; *Waddingham v. Hulett*, 92 Mo. 528; *Abbott v. Railroad*, 83 Mo. 278; *Wolfe v. Supreme Lodge*, 160 Mo. 675; *Pace v. Shoe Co.*, 103 Mo. App. 662. (2) Instruction 3 should have been given without the words in parentheses. They directed the attention of the jury to a duty to give warning, not justified by the evidence and cases cited under point one. (3) Instruction E should have been given. This correctly set out the duty of the gripman to attempt to avoid the injury. The cases cited cover this point. (4) Instruction G, though assuming the burden of possibility instead of ordinary care, should have been given, and it was error to refuse it as no correct instruction was given. (5) Instruction H on the burden of proof was improperly refused. This requested instruction applied the law to the facts pleaded. The instruction on the burden of proof allowed the jury to find any negligence of the gripman, whether pleaded or not. (6) The court erred in allowing the rock said to have been taken from next the face of plaintiff to be introduced as an exhibit. 1 *Greenleaf on Ev.* (13 Ed.), sec. 52; *Horr v. Railroad*, 156 Mo. App. 651. (7) The court erred in excluding evidence of an actual test of the distance within which a cable train could have been stopped at the place in question. 2 *Wigmore on Evidence*, sec. 1385; *Byin v. Railroad*, 94 Tenn. 352; *Riggs v. Railroad*, 216 Mo. 327. (8) The

verdict was excessive. (9) The peremptory instruction asked by defendant should have been given. In view of all the facts, the court should not have submitted the case to the jury, when a verdict could be sustained only on the evidence of the witness, Thornberry, in contradiction to his statement made at the time of the accident.

*Charles A. Stratton and Bird & Pope* for respondent.

(1) Appellant's first contention fails for two reasons; first, because the words of the petition are susceptible of a broader meaning than the narrow and somewhat sour construction that appellant seeks to place upon them; and second, even if the instruction is broader than the petition (which we deny), appellant fell into the same rut in its instruction 3, which the court gave, and it cannot be heard to complain. It has long been the law in this State that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties. Sec. 1831, R. S. 1909; See *v. Cox*, 16 Mo. 168; *Thompson v. Livery Co.*, 214 Mo. 491; *Lee v. Railroad*, 195 Mo. 415; *Ackerman v. Green*, 195 Mo. 140; *Sharp v. Railroad*, 213 Mo. 525. Also the rule that a pleading must be construed strictly against the pleader applies to petitions only before verdict; after verdict in plaintiff's favor, a petition is liberally construed. *Oglesby v. Railroad*, 150 Mo. 137; *Bank v. Assurance Co.*, 106 Mo. App. 114; *Robinson v. Ins. Co.*, 105 Mo. App. 567; *Strauss v. Transit Co.*, 102 Mo. App. 649; *Rogers v. Ins. Co.*, 93 Mo. App. 24; *Burkard v. Rope Co.*, 217 Mo. 483; *Long v. Coal Co.*, 233 Mo. 713; *Ice & Cold Storage Co. v. Kuhlmann*, 238 Mo. 685. In *Gordon v. Park*, 219 Mo. 611, the very point under consideration here is discussed and the cases reviewed by Judge



GRAVES, and the point is ruled against appellant's contention. To the same effect are: *Peterson v. Met. St. Ry.*, 211 Mo. 520; *Graves v. Chapman*, 248 Mo. 83; *Popineau v. Brick Co.*, 168 Mo. App. 547; *Riggs v. Met. St. Ry.*, 216 Mo. 304. The second point made by appellant that instruction 1 was not justified by the evidence ignores the testimony given both by the plaintiff's and the defendant's witnesses. Appellant argues on the erroneous theory that there was no duty cast upon the gripman to sound the warning until plaintiff was prostrate on the track, and that at that time the car was right upon him. It must be remembered that this was appellant's defense and that it had some testimony to that effect, but the testimony of the plaintiff and his witnesses and of some of appellant's witnesses is all the other way. The court correctly instructed the jury that if plaintiff was on or approaching the eastbound track, etc. There was testimony that plaintiff maintained a steady pace from northwest to southeast with his back partly to the approaching car; that he did not see it; that he heard the bell on the westbound car when it was 100 to 150 feet east of him and he looked toward it; that the view of Gurley, gripman of eastbound car of plaintiff, was unobstructed during all the time he was running from 100 to 150 feet, but the fact was, and the jury believed that Gurley was looking away toward the north at a workhouse gang, and rang no bell, until he was right upon the plaintiff. This very question of warning has been before this court many times, and was decided adversely to appellant in the recent case of *Ellis v. Met. St. Ry.*, 234 Mo. 683. (2) Instruction E was improper, under syl. 14 in the *Ellis* case, 234 Mo. 659: "Where there is evidence tending to show to a reasonably prudent person that the traveler, unconscious of his danger, was apparently intent on continuing his journey on and over the track, an instruction telling the jury that the motorman of the oncoming car had the right

to assume, when he saw the traveler approaching the track, that he would stop and not go on the same, and that he owed no duty to give warning or to either stop or check the car until there was actual danger of a collision, should be refused." (3) Instruction G is inconsistent with instruction 3 asked by the appellant, which correctly declared the law applicable to this case from appellant's viewpoint. (4) Defendant's instruction H was rightly refused. It was held in the *Ellis* case, *supra*, that it is not error to refuse an instruction where another given, at appellant's request, covered the same ground. (5) There was nothing improper in exhibiting the stone to the jury to clear up the physical facts with reference to plaintiff's injuries, nor to dispute the testimony of defendant's witness Hickey as to what position plaintiff lay in when under the car after being struck. It has been held in numerous cases in this court that clothing worn by the defendant, or by the prosecuting witness, and weapons found upon or shown to belong to the defendant, are properly admitted as evidence. *State v. Long*, 209 Mo. 366; *State v. Jeffries*, 210 Mo. 302; *State v. Brannan*, 206 Mo. 636; *State v. Bartlett*, 209 Mo. 403; *State v. Sharpless*, 212 Mo. 176; *State v. Barrington*, 198 Mo. 111; *Keen v. Railroad*, 129 Mo. App. 305. (6) The conclusion is inevitable that the trial court properly declined to allow defendant to introduce the testimony offered of the time actually taken to make an emergency stop at the same place, at the time of the trial, when defendant so signally failed to in any way show the conditions to be the same or that the material facts were precisely duplicated in the offered experiment. (7) Plaintiff's instruction K was rightly refused. One instruction on burden of proof was sufficient. *Ellis v. Met. St. Ry.*, 230 Mo. 660. (8) On the trial of this cause defendant did not offer a syllable of testimony to contradict the medical and other testimony showing how terrible were

plaintiff's injuries. We do not care to repeat the long list of injuries suffered by plaintiff (respondent), but respectfully call attention to the same as fully quoted elsewhere, and we doubt that, after even casually reading the same, the court can recall a case where a man was so badly injured and lived thereafter. A verdict of twice the amount would have been fully justified. We wish to call the attention of the court to a few cases where large verdicts were allowed to stand: *Gordon v. Railroad*, 222 Mo. 516; *Stotler v. Railroad*, 200 Mo. 107; *Corby v. Telephone Co.*, 231 Mo. 417; *Stoebier v. Transit Co.*, 203 Mo. 702; *Shohoney v. Railroad*, 231 Mo. 131; *Clark v. Railroad*, 234 Mo. 396.

WILLIAMS, C.—Plaintiff, while a pedestrian on one of the public streets in Kansas City, was struck by one of defendant's street cars and injured. This action is to recover damages for said injuries. Upon a second trial of the cause in the circuit court of Jackson county, plaintiff obtained a judgment for fifteen thousand dollars and defendant duly perfected an appeal to this court. That portion of the petition specifying the negligence of defendant was as follows:

“That the injuries to plaintiff, and the damages to plaintiff on account thereof, were caused by the carelessness and negligence of said defendant, in that said gripman and conductor in charge of said cable train failed to keep a proper lookout for persons who were on said street and who were liable to be struck by said train, and ran said train in a careless and negligent manner, and in disregard of the rights of persons on said West Twelfth street, and at or near said Bellevue avenue, as aforesaid, and failed to check the speed of or stop said train or warn plaintiff of the approach thereof and thereby avoid running into the plaintiff, when they saw, or by the exercise of ordinary care ought to have seen, that plaintiff was in a

situation where he was liable to be run into by said cable train unless the speed of said train was checked or it was stopped or plaintiff warned of the approach thereof before it collided with plaintiff."

The answer was a general denial. The accident occurred about noon, December 1, 1908, at the intersection of Bellevue avenue and West Twelfth street, Kansas City, Missouri. Twelfth street runs east and west. Upon this street the defendant had a double track and at the place in question there was about a five per cent grade in the street car tracks, being down grade to the west and up grade to the east. The north track was used for westbound or down grade cars and the south track was used for eastbound or up grade cars. Plaintiff was injured by one of the eastbound or up grade cars. The street cars at this place were operated by means of an underground cable which was propelled at a rate of about eight miles an hour by means of a stationary steam engine. The train of cars operated at this place consisted of one grip car and one trail car or coach and each train was in charge of one gripman and a conductor. The grip car was in front. A steel grip attachment extended down from the grip car through a slot or opening between the rails of the tracks and connected with said underground cable. This grip was operated by the gripman by means of a lever in the grip car. The car would be moved forward by the gripman causing the grip or clutch to fasten onto the underground cable, which would cause the car to move at the same rate of speed as the underground cable. The cars were stopped by releasing this grip and applying brakes. The train was equipped with two brakes, one a ratchet brake which operated on the wheels of the grip car and the other an automatic brake which operated on the wheels of the trail coach. The ratchet brake would begin to operate as soon as applied but the automatic brake would not begin to operate until four or five feet of

slack was taken out of the chain. Just prior to the accident the situation was as follows: Defendant, coming from the north, started diagonally to the south-east across the tracks. At this time a westbound car was between one hundred and one hundred and fifty feet to the east of the plaintiff and the up grade or eastbound car which afterwards struck him was coming up the grade between fifty and ninety feet to the west of plaintiff. Plaintiff's testimony as to how the accident occurred was as follows:

"I was traveling east, diagonally over Twelfth street, and I crossed over the north track, or just before I got to the north track I seen a car coming down hill. When I got between the north and the south track, my foot slipped and I fell down on the south track, and before I could get up the car was over me. I didn't see this car coming. At the time the car struck me I was trying to get up. I think I was on my hands and knees. When the car passed over me I made a grab at something underneath the car to try and hold myself free from the pavement, and I couldn't keep myself up. I could feel, my bones break in there, in the arm, and also my face being crushed on the pavement—about five or six seconds after I was struck, judge. Don't know how long I was able to hold on; seemed a long time. Held up as well as I could for that length of time, but could not hold myself up until the car stopped. At that time was pretty strong for my age and size. . . . I fell while I was between the two tracks. My foot slipped as I was walking along. I don't know what it slipped on. I fell forward onto the south track and down on my hands and knees—from the north over to the south track. I fell when I was between the north and south tracks—forward; expect I almost caught myself, fell half way over the track. About the middle of my body across the north rail of the south track, and while in that position this car ran over me. Think I fell in the direc-

tion I was going—southeast diagonally across these tracks—I naturally must have fell in that direction I was going. I was going southeast. . . . From the time I fell and before I had time to get up the car ran over me. Don't know how far the car was away when I fell. Had never seen the car at all."

A man by the name of Thornberry was the conductor and a man by the name of Hickein was the gripman on the westbound or down grade car. A man by the name of Gurley was the gripman in charge of the eastbound car which struck the plaintiff. Said Thornberry, who was not working for the defendant company at the time of the trial, testified that the accident occurred as follows:

"I live at Sedalia, Missouri; have been since I was six. Worked as conductor for the Metropolitan Street Railway Company, December 1, 1908. Saw Mr. Holzemer when he was struck by the oncoming car. I was on the grip car of the train going west on Twelfth. I was conductor, out there collecting fares. The gripman was S. R. Hickein. When I first saw Mr. Holzemer he was coming from the north across the tracks in a southeast direction, crossed our tracks and was in the clear, and I didn't pay any more attention to him at that time. When I last saw him he was on his hands and knees on the south track. At that time the upcoming car, I guess, was probably fifteen or eighteen feet from him. When I saw him in that position I hollered at Gurley, the gripman on the other car. I judge that other car went about fifteen feet and maybe more after its struck Holzemen; all of that. There was no decrease in the speed of the car there that I could notice from the time I first noticed and hollered at Gurley until Holzemer was struck. The speed of the road there is eight miles an hour. I had been conductor there the last time fifteen or eighteen months. Never worked as a regular gripman, but had gripped some—at nights—just a trip or so every night.

Have had occasion to stop a grip car coming up that grade, one night when a milk wagon had backed on the track, and we were in twelve or ten feet of this wagon and I stopped the car then. That was right at the top of the incline, about the same place where Mr. Holzemer was struck—I don't know whether that is called Belleview or Lincoln. The street is not cut through to the south. Travel coming up the hill crossed Twelfth street diagonally as a rule. I had gripped a trip or two at night ever since I have been over there; understood the appliances for stopping the car. They were ratchet brake and automatic brake. The ratchet brake was on the left-hand side of the grip. It works on the grip car wheel. The automatic brake works on the coach; that is on the right-hand side of the grip lever. The up-hill car, Gurley's car, had a seated load; I should judge forty or more passengers. The car stops quicker with a heavy load. . . . Q. Now, when you saw Holzemer clear your track when you first saw him there, how far was your car from him then? A. Well, it must have been nearly 100 feet or closer, probably, east of him.

"My car was sixty-five or seventy feet from him when I saw him the second time on his hands and knees. I was collecting fares from passengers on the grip. At the time the chain gang from the workhouse was working on the street going down the bluff—right north of Twelfth street. Don't know how far along the road they were working. Think that is Kersey Coates Terrace roadway. When I saw Gurley I noticed the people in the grip car there. They were looking north, and Gurley was looking north. This chain gang was north of him. When my down train stopped I got off the grip car and went around this coach where Holzemer was laying under the grip car, with his head to the middle of the track, to the north, his knees down south of the south track. He was underneath the front part, the fender. The wooden fender

was right over his forehead right along there (indicating), through the right part of his face, head wedged down against the cobblestones."

There was evidence offered by plaintiff tending to show that the bell or gong on the eastbound car was not sounded by the gripman as the car approached the scene of the accident. Plaintiff's evidence tended to show that street cars coming up this up grade with a load of passengers and the conditions similar to those under which the cars in question were being operated on the day of the accident could be stopped by the gripman in a distance of less than fifteen feet. Some of the witnesses putting the distance at six feet, others at eight and some at ten and twelve feet. Plaintiff was fifty-seven years old at the time of the injury. His occupation was that of boiler maker and he worked for the Missouri Pacific Railway Company at Marquette, Kansas, and had come to Kansas City from his home in Kansas the day before he received this injury. At the time of the injury he was earning from one hundred dollars to one hundred and seven dollars per month and weighed one hundred and thirty-nine pounds and was in good health. Since a question is raised as to the excessiveness of the verdict, it becomes necessary to state somewhat in detail the evidence concerning plaintiff's injuries. The evidence concerning the injuries received was uncontradicted. Plaintiff testified concerning his injuries as follows:

"Was at the hospital there from December 1, 1908, to January 26, 1909. . . . I got back to Marquette on the 5th day of May, 1909, and went back to work for the Missouri Pacific on the 11th day of May, 1909. I was working on engines, calking leaks, and putting staybolts in and such like. It was hard, hot work. When I would get in the engine my head just seemed as though it would swell up. I was getting dizzy. Also my arm was so weak that I couldn't do the work right. The wipeman, Fred Sharkey, helped me do that work.



Didn't work longer than a week, because I was not able to do the work; couldn't stand it. Done no work since. Wasn't able to work. I was struck down on my face, down along, in here (indicating right side of face), through here (indicating) and down through here, at my nose, it was broken and my teeth were knocked out. I was cut on here (indicating); my right eye was injured. I was bruised in through here (indicating chest) some, both broken here in the vertebrae, the third vertebra, the spinal column, the doctor called it. My right arm was broken in two places, hurt down around the chest, in through my back and right shoulder. Don't know how big a cut that was around my right eye. My face was split open. My head was all bandaged up and I couldn't say how big it was. Must have been cut way in, my face was laid open. Jaw was broken (indicating right side of head). . . . Think my jaw had to be wired up to hold it together. Don't remember when they put the wires in. . . . Something wrong in back there. I can't move my head as I should, and if I go to sleep I lay in bed a couple of hours or more before I know which way to get my head to get to sleep, keep moving around, and finally, then, it seems like though it gets numb and I drop off to sleep.

"Am bothered with headache now in here (indicating top of head). Seems always a kind of whirling noise, humming like. Pain in the top of the head. Headache generally lasts about an hour; sometimes half a day. . . . This injury in my back, neck, the bones thickened out, whatever it is, I don't know. Yes, you can feel it (witness exhibits his neck to the jury, having taken off his collar and tie).

"The Court: Let each juror put his hand on the place there, so he can know, so that all have the same knowledge. (Jurors do so.)

"Did not have that lump there in my spinal column before I was hurt. Was cut through on the upper

lip, through there and through here (indicating), I guess just as far as the jaw. Nose was broken right here (indicating). Bothers me now. I can't breathe very well through it at the right nostril. Notice that as soon as I got the bandages off my face. The cut near my right eye hurts the eye. I can't see very good with the eye, and there are times when it seems like though there was a needle run in, comes down kind of sudden like. Can't see to read very much out of that right eye. Looks like two or three lines where there is only one line. Eyesight was good before I got hurt. Am a little hard of hearing. Boilermakers generally are. I could hear 'most anything at that time, but now I cannot hear a thing out of the left ear. Don't know how many teeth I lost. Before I was injured I had 'most all my teeth with the exception of two or three. While in the hospital they fed me with a little dish with a pitcher-like spout which I put in my mouth—kind of like soup. Guess I was fed on that about a week and a half or two weeks. My head was so bandaged up, they always kept all these bandages on so I couldn't open my mouth and they had to feed me that way. The loss of my teeth bother me now in eating. Can't chew anything. My teeth lap over; they don't come down on one another so that I can bite them. Can't chew beefsteak, meat. Was fond of meat before. Don't know whether my face was bruised. For a long time it seemed as though there was a weight pressing down on top of my head. Whilst I was in the hospital I would try to look up and see who was pressing on my head and there was nobody there pressing it. At times feel a sensation like that now, maybe once a month; maybe sometimes oftener. Have no strength in my right arm. I know it because I can't use a hammer. Can't use nothing. It is weak. My arm was broken here at the wrist and also in around here (indicating part of lower arm). About where the arm was broken when I was a school boy is here (above

the elbow). Back was hurt up around near the shoulder, between the shoulders. Noticed it hurting me during the week I worked at Marquette, from the shoulders over in there and around the chest. Chest hurts me now in here (indicating); feels bruised and sore-like all the time. Feels numb from the shoulder down to the arm here at times—maybe about every day; especially if I am walking a little ways, it seems as if there was some little weight pulling down here as though it was heavy (indicating arm). Can't grip anything very hard in my right hand. Hammer handle keeps turning around in my hand. Professor Schwartz at Fort Scott treated me there for about a month, masseur treatment. That helped me. Before he treated me I couldn't move my arm any way, and my hand stood out like that so I couldn't close my fingers at all. He treated me for my back and arm, and it got so I could close my hand. Was injured on my right leg above the ankle, in here (indicating). There was some flesh torn out there almost two inches square or round, and it was bruised."

Dr. Neal, the acting superintendent of the general hospital, who attended plaintiff when he was brought there for treatment on December 1, 1908, described the plaintiff's injuries as follows:

"He had some lacerations about the face, was bloody and dirty from evident contact with the dirt on the street, or something of that kind. I found he had a fracture of the jaw and cheek-bone, double fracture of the forearm, and wounds on the face, on the chin and on the cheek. We surgically cleaned the wounds. There was a fracture of the nose and, as I recall it, there was a linear fracture extending across the temple into the skull, from this wound which laid open the cheek up into the eyebrow. These wounds were surgically cleaned and sutured; that is, sewed up, with drainage; and the fracture of the arm reduced. The man was put to bed; remained there probably seven

or eight weeks. I had general supervision of his treatment. My two assistants, Dr. Bates, who carried out most of the treatment, and Dr. English, were also on the surgical service at that time. Dr. Bates is now at Adrian, Missouri, about sixty or sixty-five miles from here. Dr. English, the last I knew of him, was one of the assistant physicians at the tuberculosis sanitarium at Mt. Vernon, Missouri. I examined the plaintiff on the 23rd of this month. Was present at the making of the X-ray picture, helped place Mr. Holzemer in the position that would show the injury to the neck. Have had some little experience with the making of those plates, and can read them to my own satisfaction, at least. Without reference to the plates, I felt around this cervical vertebra for evidence of injury there, and found there was a part of a cervical vertebra there in which there was no motion between the individual bones, and then they were fused or grown together, healed together in some way. The X-ray picture shows the condition present under those circumstances and the various bones as they are. Don't recall that he complained of any injury to his neck when he was brought into the hospital. I thought that the man could not live but a few hours. He was in bad condition mentally and physically. I couldn't say how long it was before he was able to give any clear connected statement."

The doctor then exhibited to the jury the X-ray plates showing the injury to the bones of the spinal column. The doctor also testified that he made an examination of the plaintiff about two years after the date of the injury and found the following conditions existing:

"I found that he had a healed fracture of the nose, of both nasal bones and the septum of the nose, with depression of the bridge. The septum of the nose is deviated to the right, almost closing the right nostril. The point of the nose is also deviated to the right. The

septum is the middle bone and cartilaga which separate the two nostrils. I found a scar or lacerated wound extending from the nasolabial fold, which extends from the nose down to the corner of the mouth, extending on the right side upward outward irregularly to the corner of the right eye. Then upward and inward from that up to a point directly above the center of the upper lip, scar adherent to the malar or cheek-bone, and also to the upper maxillary or jaw-bone. The malar or cheek-bone presents evidence of healed fracture. It is depressed, displaced, and the *service* (surface) is very irregular. The lower lid of the right eye is drawn downward and outward by the above described scar. The outer portion of the lower right lid is averted, that is, turned outward, showing the red mucous membrane. Unable to fully close the right eye on account of the contraction of the lid. Tears slightly overflow on the face. Healed scar of lacerated wound extending from the center of the lower lip outward to a point three-quarters of an inch below the left corner of the mouth, and thence irregularly downward and inward under the point of the chin to a point one and one-half inches below the right corner of the mouth. A scar adherent to the jaw-bone, and the jaw-bone, a palpable deficiency in the jaw-bone on the right side at the point of the chin at the seat of old fracture. Only two teeth remain in the upper right jaw; the other six are missing. The upper right lateral and incisor—that is, the second ones from the center, and canine teeth; the teeth are broken off flush with the gum. The other four are entirely missing. Then the two molar or back teeth are missing in the lower right jaw and the same in the left. The remaining teeth in the upper and lower jaw do not articulate accurately. That is, I mean they do not come together as they should on account of the fracture of the jaw. Some paralysis of the face muscles on the right side. Unable to pucker lips. Right corner of mouth drooped to a considerable

extent. Unable to fully protrude tongue on account of above paralysis. Tongue when protruded as far as possible falls to the right. Speech seems thick and uncertain, and slightly halting. Has some difficulty in pronouncing some sounds of words containing 's,' 't,' and 'th.' Seems to have been entirely deaf in the right ear; partly so in the left. An old fracture of the right elbow of many years' standing. Healed fracture of the right ulna. Healed fracture of the right radius at the middle of the bone. That would be about the middle of this outer bone of the arm (indicating). Right forearm much smaller than the left, showing by the following circumstances: circumference of wrist, right, 6 inches; left  $6\frac{1}{2}$ ; circumference of forearm five inches above the wrist, right  $7\frac{1}{2}$ , left 8; slight deviation of the axis of the eyes, that is, the line sight of the two eyes is not exactly parallel. Neck and spine, lateral curvature of the spine with convexity to the right extending from about eighth dorsal, that is, about the middle of the chest, up to the second cervical vertebra from the skull. Unable to fully flex head either anteriorly, posteriorly or laterally; that is, he cannot throw his head forward or back or far to either side, as far as a normal man can. Found great difficulty either when he was remaining passive or flexing it himself, either active or passive motion. There is evidence of injury to all the cervical vertebrae except the first. All the cervical vertebrae from the second to the seventh inclusive are fused together and move as one bone. All the bones in this region surrounding the spinal canal are fused together. His thickness of speech comes from his inability to protrude the lips and tongue as a normal man does. There is some slight paralysis of the lips, slight paralysis of the tongue, which could come from these injuries. The right arm is smaller than the left. Normally it should be as large. Assuming

plaintiff is weaker now than he was before he was injured, that could be the probable and natural result of his injury. With the amount of injury which was shown in the vertebrae there, there must be some interference with his nerve supply to his arm, of course. His nervous system at the time of this injury received a distinctly severe shock, and that probably remains with him at the present time. Those bony injuries are permanent injuries. In my opinion the paralysis is permanent. It has been going now for two years."

On cross-examination the doctor further testified:

"He was pretty badly bunged up when they brought him out there. I thought then it was very questionable whether he would recover. I examined him and found these broken bones, and set them, or it was done under my direction. He unquestionably received proper treatment. He responded to the treatment. I did not expect him to recover. Made as thorough examination at the time as his condition would permit. Don't recall that I found any dislocation of his neck or bones in his neck at the time. If I found a dislocation of the neck, I might have done something for it or might have let it run, depending largely upon the symptoms. There were no symptoms at the time pointing to anything wrong with the neck, that I recall. The two places on his arm that were broken were set either by myself or Dr. Bates under my direction. They grew together in fairly good position; don't think I would like to say it is as strong as it ever was. His arm is in pretty good shape for a man who had his arm broken in two places. The union is permanent. The fracture of the nose has entirely healed. Lower jaw bone was broken in one place and there was a fracture extending into the upper. Those have healed in fairly good shape, but he has not his teeth; they don't articulate properly, I think from the position in which the jaw has healed. They healed

fairly well in the position in which the bones were set.

“Q. Now outside of Mr. Holzemer being disfigured in appearance, there is not anything so very much wrong with him, to-day, is there? A. Yes, sir, there is. That fusing together of the bones of the neck is a matter which I would consider a very serious matter had I had it myself. Outside of that there is difficulty in talking, partial paralysis of the tongue, and the few teeth remaining do not properly articulate, which must be very inconvenient. Gets around pretty well for a man fifty-nine years of age; seems to have no great difficulty in locomotion. Does not look sickly. Outside of his injuries I should say he is a very good man—outside of all his injuries together.”

The evidence on the part of the defendant tended to show that the bell or gong was sounded on the east-bound car as it approached the scene of the accident and that it would take from twenty to thirty feet to stop the car under the conditions existing at the time of the accident. Some of defendant's witnesses testified that if the car was on a level place and the grip was released from the cable and no brakes applied the car would move fifty-five or sixty-five feet before it would come to a stop. S. R. Hickein, who was the gripman on the down grade car near the scene of the accident, testified that the accident occurred as follows:

“When the accident happened I was going west down the hill at Twelfth and Summit. Thornberry was my conductor. . . . When I first saw Holzemer he was on the westbound track, about Bellevue, the north track on which our car was running. When I first saw him he was standing on the north side of the north track, and I rung my bell, and he looked up and started across the track, and he kept in between the two tracks for a minute, and then he stepped right in front of this other car coming up the hill; it was right up to him—within two or three feet of him. Before



the car struck him he got about to the center of the track, about over the steel (slot) rail. He didn't fall at any time there until after this car struck. After it struck him and stopped I stopped my car right beside of it. The front end of my grip car was right even with the back end of his coach. I got off and went around the car to help the man that was hurt. He was lying on his back with his feet to the northeast, his head to the southwest, with his head back, the back of his head on the rail; the fender of the grip car made of oak boards resting right across his face."

On cross-examination he further testified:

"When I saw Holzemer he was right on the north side of the north track, not over a couple of feet from the north rail. He was looking to the west, towards the depot. I rang my bell and he turned and looked towards my car. When I rang, my car was about 100 or 150 feet from him. That is as near as I can say. I rang to warn him of danger, as was my duty. I did not see him until that time. He was then standing still looking towards the west. He started south almost as soon as I could commence to ring the bell—stepped across the track. . . . He glanced at me, commenced moving towards the south, got about in between the two tracks, hesitated, and then stepped right in front of the other car. He stopped just an instant in between the two tracks; I couldn't say whether he was nearer the north or south track. I was then about seventy-five feet from him, and began to set my brakes and ring the bell. He stopped there just momentarily and went right on. If I hadn't been watching I couldn't have told he stopped at all. Stepped over, hesitated and then went right on. Gurley was away two or three feet from him when he took a step. I didn't measure it; I just judged by the time it hit him. He couldn't have been over a foot or so from the south track when he made that step. The distance between these two rails is four feet I believe. I judge

he was about a foot from the south track when he stepped over, by the time from the time he moved until the car hit him. When Holzemer did step, Gurley's car was going about eight miles an hour, and Holzemer was hit almost instantly as he got on the track. He stumbled over the drawhead of the grip car and fell over on the track and we found him with his head on the south rail. His feet were on the slot rail between the two running rails. The fender was on his face, the part of it that reached over the south rail. . . . When I rang my bell for this man, Gurley's car was then twenty-five or thirty feet west of Holzemer. When I first saw this man I didn't notice Gurley's car at all. Didn't notice it until he started to walk south. Just noticed Gurley's car when he made the first step. The car was then twenty-five or thirty feet from the point of collision; and when he got in between the two tracks Gurley's car was then about ten to fifteen feet; and when, after hesitating, he stepped on the track the car was right again him. He did get on to the track before the car hit him. That car, without any one under it, couldn't be stopped under twenty-five or thirty feet. Holzemer was dragged about eight feet. Before Holzemer made any step, and Gurley's car was two or three feet from him I saw Gurley ringing his bell. He applied his brake about the time that he hit him."

S. L. Witton, a passenger on the eastbound car at the time of the accident, testified as follows:

"I was on the eastbound car that struck Mr. Holzemer at Twelfth and Belleview coming up the incline there, sitting on the front seat of the grip car on the south side. When I first saw Mr. Holzemer he was north of the north track. I judge our car was then about ninety or 100 feet west of him. He was about ten feet north of the north track and I watched him until he stepped on the north track. Then I taken my eyes off of him and looked back and the car was strik-

ing him. I just threw my eyes across the street south. At that time, the last time before the car struck him, I would judge he was fifty feet or more from the car. Then the last time I looked I seen a man—I don't know whether it was him or not—I seen a man struck and stepped in front of the car. I don't know how far we were away when he stepped in front but I looked around just as the car struck him. He was just about half way, I would judge he would be, from what we call the center of the car to the north side. With reference to the north rail of that track I would judge he was about two feet over on the track.

“Q. . . . Was he down on his hands and knees, or was he up? A. He was up.

“He fell to the south. He seemed to catch—I couldn't tell you what he caught on. He went down past my view then. I jumped off. There certainly was a bell rung on the car as he came up there. This man that was struck was not down on his hands and knees when our car was fifteen or twenty feet away.”

On cross-examination, he further testified:

“When I took my eyes off the man he was on the north track, I would judge just about the center. He was heading southeast and kept going all the time I could see him. Did not at any time see him look west. When I took my eyes off him, when he was in the center of the track I guess our car was fifty or sixty feet from him. At that time he was walking towards the track and just about the center of the north track, I would guess. When I looked again the car was striking the man. I saw he had his hand up.”

Mr. Gurley, the gripman in charge of the car that struck plaintiff, did not testify. M. M. Powers testified that he saw the accident; that at the time he was standing about twenty-five feet north of the place where the accident occurred. His testimony was as follows:

“When I first saw Mr. Holzemer he was right in front of the car—a little bit to the north side of the

center of the car. He was leaning forward with his hands throwed up a little bit. He had his hands throwed just like fixing to fall. It was done so quick I couldn't tell how far the car was away from him at that time. He was standing up; he was not down on his hands and knees in front of the car that I seen.

"Q. Did the car strike him just after you saw him? A. It would have been just the second before or right at that instant, I don't know. He was just leaning like he was falling. He was falling at that time, a little bit to the southeast. Then he was struck and went on the ground. Was drug about six or eight feet."

Defendant's testimony showed that the gage of the street car tracks at that place was four feet, eight and one-half inches and that the distance between the two rails was four feet, seven inches.

Instruction 1 given on behalf of plaintiff was as follows:

"The court instructs the jury that it was the duty of the gripman, in charge of the eastbound cable train mentioned in the evidence, to exercise the care of a reasonably prudent gripman, to keep a reasonably vigilant lookout ahead for persons on or approaching the eastbound track upon which said cable train was running. If therefore you believe and find from the evidence that on or about December 1, 1908, and at about the hour of twelve o'clock noon, on said day, the plaintiff was walking southeast on West Twelfth street, in Kansas City, Missouri, and was crossing the tracks of said defendant at or near Bellevue avenue and said West Twelfth street, and that said West Twelfth street was a public street and thoroughfare of said Kansas City, Jackson county, Missouri, and that one of the cable trains of the defendant, eastbound, was run into and against the plaintiff and injured him. And if you further believe and find from the evidence that plaintiff was on or approaching the eastbound track of the

defendant at or near said Belleview avenue and West Twelfth street, and that by reason of the fact that he was on or approaching said eastbound track, he was in a situation, or was going into a situation where it was reasonably probable that he would be run into by said cable train and injured, unless the speed of said train was checked, or it was stopped before it collided with him, and that the gripman in charge of said eastbound train saw, or by exercising the care of a reasonably prudent gripman, under the circumstances, would have seen that plaintiff was in a situation, or was going into a situation where a reasonably prudent gripman would have concluded that it was reasonably probable that plaintiff would be run into by said cable train and injured unless the speed of said train was checked, or it was stopped, or plaintiff was warned of the approach of said train before it collided with the plaintiff. And if you further believe and find from the evidence that said gripman in charge of said eastbound train saw (if you find he did see), or by exercising the care of a reasonably prudent gripman, under the circumstances, would have seen (if you find that by exercising such care he would have seen), that plaintiff was in a situation, or was going into a situation where a reasonably prudent gripman would have concluded that it was reasonably probable that plaintiff would be run into by said cable train unless the speed of said train was checked, or it was stopped before it collided with the plaintiff, and could, thereafter, by exercising the care of a reasonably prudent gripman, under the circumstances, and with due regard to the safety of the people on said cable train, have checked the speed of said car, or stopped the same or warned the plaintiff of the approach of said train before it collided with the plaintiff, and thereby could have avoided colliding with and injuring the plaintiff, and failed to do so, then the defendant was negligent. And if you further believe and find from the evidence that said negligence

(if any) of the defendant caused the injuries (if any) to the plaintiff, then you will find for the plaintiff, and assess his damages (if any) at such sum as the evidence shows is a full, fair and just compensation for the injuries (if any) sustained by him, considering their nature and character as shown by the evidence, not exceeding, however, the sum of twenty-five thousand dollars (\$25,000) the amount claimed in plaintiff's amended petition, although you may further believe and find from the evidence that plaintiff was negligent, or did not exercise the care of an ordinarily prudent person under the circumstances, in crossing the tracks of the defendant without looking or listening for, or becoming aware of the approach of, the cable train that collided with him."

Defendant's given instruction 2, was as follows:

"The court instructs the jury that the burden of proof is on the plaintiff to prove to your reasonable satisfaction by the preponderance or greater weight of the credible testimony that the gripman was guilty of negligence; and unless you believe and find from the evidence in the case that the plaintiff has proved by a preponderance of the credible testimony, to your reasonable satisfaction that the gripman was guilty of negligence, and that such negligence was the direct cause of injury complained of, then your verdict must be for the defendant."

Defendant's given instruction 3 (the portion in parentheses having been inserted by the court over the objection of defendant) was as follows:

"The court instructs the jury that even though you might believe and find from the evidence that the gripman operating the car saw the plaintiff approaching the eastbound track, yet under the law the gripman was not required to begin to stop his car or to check or slacken the speed of same until he saw, or by the exercise of ordinary care could have seen that the plaintiff was not going to stop before he got into a position of

peril, and you are instructed that if you find and believe from the evidence that the gripman could not by the exercise of ordinary care prevent the accident (by stopping the car or checking or slackening the speed of the same or by warning the plaintiff) after he saw or by the exercise of ordinary care could have seen that the plaintiff was not going to stop before he got in a position of peril, your verdict must be for the defendant."

I. Appellant contends that plaintiff's instruction 1 was erroneous: (1) because it enlarged the issues framed by the petition; (2) because it was not justified by the evidence.

With reference to the first objection, appellant insists that the use in the instruction of the phrase "going into situation" instead of the phrase "in a situation" as alleged in the petition amounted to an enlargement of the negligence alleged. We are unable to agree with this contention. It will be noticed that both in the petition and in the instruction the "situation" in which plaintiff is required to be before the defendant is required to act, is one which, if it continued to exist, coupled with the failure of defendant to do certain specified acts, will result in plaintiff being struck by the car. The allegation of negligence in the petition, especially when given the liberal construction to which it is entitled after verdict (*Sharp v. Railroad*, 213 Mo. 517, 1. c. 525-526), is sufficient in scope to embrace the meaning that plaintiff was moving toward the fixed path of the street car in such a manner and under such surrounding circumstances as would cause him to be struck by the car if the gripman did not do certain things with reference to the operation of the car or give a warning of the car's approach. Furthermore, appellant should not now be heard to complain in the above regard, since it adopted

Negligence:  
Going into  
Danger:  
Street  
Railways.

practically the same theory in its instruction 3, wherein the gripman is not required to act "until he saw, or by the exercise of ordinary care could have seen that the plaintiff *was not going to stop before he got into a position of peril.*" [Gordon v. Park, 219 Mo. 600, l. c. 612, and cases therein cited.]

In support of the second objection to said instruction appellant contends that there was no evidence that the gripman could have seen the plaintiff going into a situation of danger. It is a sufficient answer to this to say that the evidence shows

**Duty of  
Gripman.**

that plaintiff coming from the north started across the double tracks of defendant in a southeasterly direction, unaware of the approach of the eastbound car. This would throw his back somewhat towards the eastbound car. A westbound car was also approaching the crossing. It is very doubtful if there was sufficient space between the two tracks to allow a pedestrian to stand between two passing cars. At the time plaintiff started across the tracks he was within plain view of the gripman on the eastbound car. And had the gripman been looking ahead he could have seen plaintiff in the above situation and could have seen him crossing the north track to avoid the westbound car and therefore could have reasonably anticipated that plaintiff would come within the danger of the eastbound car, if it was not slackened or stopped, or the plaintiff given some warning of its approach so that he would wait until it had passed or, if in a position where he could not wait by reason of the other car approaching him from the east, to have caused him to have put forth an extra effort to clear the eastbound car.

Appellant further contends that "there was no evidence that any warning could have been given which might have avoided the accident." In

**Warning.**

support of this contention, appellant cites the case of *Heinzle v. Railroad*, 182 Mo. 528. But



the facts in that case clearly distinguish it from the present case. In the Heinzle case the evidence shows that the motorman in charge of the car did not see and could not have seen the little girl until she ran out from behind another car, within a very few feet of the oncoming car and too close to the car to have been saved by any action upon the part of the motorman after he could have seen her. But in the present case, the gripman's view was unobstructed and he could have seen the plaintiff approaching the danger, unaware, had the gripman been in the exercise of proper care upon his part. Under the situation

**Question  
for Jury.**

it was for the jury to say whether the giving of an alarm would have aided in preventing the injury. [Cytron v. Transit Company, 205 Mo. 692; Ellis v. Met. Street Ry. Co., 234 Mo. 657, 1. c. 683.]

II. Appellant further contends that the court erred in refusing its instructions "E," "G," "H," and "K." Instruction "E" told the jury that even though the gripman saw plaintiff approaching the track, yet under the law he had the right to assume that the plaintiff would stop before he went upon the track and that the gripman was not required to check or stop the car until there was danger of a collision. Under the evidence in this case, instruction "E" was properly refused. [Ellis v. Met. Street Ry. Co., *supra*, 1. c. 681.] The correct theory applicable to the evidence in the present case is contained in appellant's given instruction 3.

Instruction "G" was as follows: "The court instructs the jury if you find and believe from the evidence that at the time that the plaintiff got into a position of peril that the car was then so close to him that it was impossible for the gripman to avoid the accident, plaintiff is not entitled to recover in this action, and your verdict must be for the defendant."

**Refusal:  
Points  
Already  
Covered.** The court did not err in refusing this instruction, because the law applicable to the points attempted to be covered by said instruction had already been properly set forth in plaintiff's instruction 3 above mentioned.

Instructions "H" and "K" were on the question of burden of proof. This point was properly covered by appellant's instruction 2 which was given by the court, and the refusal of these instructions did not constitute error.

**Hypothetical  
Question:  
Insufficient  
Objection.** III. The action of the court in admitting certain evidence is assigned as error. Under this point it is claimed that the court erred in permitting Dr. Neal to answer a certain hypothetical question because the question asked was not based upon all the facts shown by the evidence. With regard to this point it is sufficient to say that the reason or ground now given by appellant as to why the question was improper was not contained in the objection made to the question at the trial.

**Evidence: Stone  
Removed from  
Face of  
Injured Man.** It is further contended that "the court erred in allowing the rock said to have been taken from the face of plaintiff to be introduced as an exhibit." The introduction of this evidence occurred in the following way. Witness Russell testified that he helped take plaintiff out from under the car. That portion of his evidence concerning the rock was as follows:

"After we got him up I saw a stone in his face and I pulled it out, right there through the jaw.

"Q. Now is that the rock you saw there?

"The Court: Wait a moment. Do not show that outside of the paper.

"Mr. Bird: Just state whether or not that is the rock? A. Yes, sir, that is the rock.

"Q. And whereabouts, now, on Holzemer did you find this rock?

"Mr. Page: I object to that as immaterial, and not proving or tending to prove any allegations of negligence contained in the plaintiff's petition.

"The Court: It is not intended to prove negligence, I presume; but as bearing on the injuries. I presume that is what it was for. Go ahead.

"To which defendants duly saved its exception.

"I took that out of the jaw; right by the side of his jaw there (indicating).

"Mr. Bird: We offer that in evidence.

"Objected to by defendant for the reason that it does not prove or tend to prove any allegation contained in plaintiff's petition.

"Objection overruled; to which defendant duly saved its exception."

The trial occurred about two years after the date upon which plaintiff received the injuries and the wounds on his face had undoubtedly healed much in that time. The introduction of the stone which the witness claims to have pulled from the face or jaw of the plaintiff just after the injury would enable the jury to get a more accurate impression of the original extent of that portion of his injuries. The extent of plaintiff's injuries was one of the issues in the case and therefore the above evidence was properly admitted.

IV. It is next contended that "the court erred in excluding evidence of an actual test of the distance within which a cable train could have been stopped at the place in question." Two of defendant's witnesses were asked if they had seen "an emergency stop made there this morning," and further asked "within

Evidence of  
Experiments:  
Preliminary  
Proof.

what distance was the car stopped." To these questions plaintiff's counsel objected. The court sustained the objections and the defendant excepted to the ruling of the court. In the case of *Riggs v. Railroad*, 216 Mo. 304, the rule with regard to receiving evidence of experiments and their results was stated by LAMM, P. J., as follows: "We find no fault with plaintiff's proposition of law, viz.: that experiments and their results are admissible proof when it is first shown that *causal* conditions and circumstances are substantially reproduced at the experiments." Under the above rule the questions asked did not lay a proper foundation for the introduction of the evidence showing the result to be of the experiments which were claimed to have been made. Furthermore, when the court sustained the objection to the question, appellant did not make an offer of proof setting out what the testimony of the witnesses would be if permitted to testify in that regard and for that reason, even though the question had been properly propounded, we would still be unable to determine whether or not the exclusion of the testimony constituted error. [*Copper & Iron Mfg. Co. v. Manufacturers' Ry. Co.*, 230 Mo. 59, l. c. 77; *Shelby County Ry. Co. v. Dimmitt*, 235 Mo. 489, l. c. 492.]

Excluded  
Evidence:  
Offer of  
Proof.

V. It is further contended that appellant's peremptory instruction requested at the close of the case should have been given. In support of this proposition appellant does not contend that there was a failure of proof but that the principal witness for plaintiff showed by his own testimony that he was unworthy of belief. The credibility of the respective witnesses was for the jury's determination. In passing upon the motion for a new trial the trial court passed upon the question of the weight of the evidence

Appeal:  
Credibility of  
Witnesses.

and ruled against appellant's contention. The testimony is not of such character as would justify this court in saying that the court erred in that regard.

VI. It is next contended that the verdict was excessive. After careful consideration we have reached the conclusion that the verdict is excessive by three thousand dollars.

If, therefore, the plaintiff will, within ten days, enter a remittitur of three thousand dollars as of the date of the judgment in the trial court, the judgment will be affirmed for twelve thousand dollars with interest at six per cent from the date of the judgment in the trial court; otherwise the judgment will be reversed and the cause remanded. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

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JOHN S. DE LASHMUTT et al., Appellants, v. G. O. TEETOR et al.

Division One, July 14, 1914.

1. **REAL ESTATE: Law of Situs: Trustee Substituted by Foreign Court.** A resident of the State of Maryland devised lands in Missouri to trustees for sale and conversion. On the surviving trustee's *ex parte* application to a court of Maryland he was relieved and another citizen of that State was appointed to and assumed the trust. This last trustee, who was also sole administrator of the testator's estate c. t. a., deeded the lands to one under whom defendants claim. *Held*, that the trustee's deed was ineffectual to transfer the title, only the courts of the *situs* having jurisdiction to deal directly with real property.
2. **CONVERSION: For Purposes of Distribution: Failure of Trust on Final Distribution.** In 1878 a testator in Maryland devised land in Missouri to A, B, and C, three of his executors,

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De Lashmutt v. Teetor.

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in trust that they or their survivors should sell it in whole or in part, at public or private sale, upon such terms and at such time as they might deem most advantageous for the estate, and pay the proceeds to the executors to be distributed according to the provisions of the will. One-sixth of his estate the testator gave in trust for a daughter during her life, to be conveyed to the daughter's children at her death. The sole surviving trustee was relieved by a Maryland court in 1887, the Missouri land being still unsold, and a trustee was appointed whose attempted conveyance to defendant's grantor failed to pass the title. *Held*, that the power of the trustees appointed by the will was limited to conversion for distribution according to the provisions of the will; and that upon final distribution of the estate, their power over lands still unsold ceased, and the legal title to one-sixth thereof vested in the trustee for the testator's daughter, and after the death of the daughter became vested in her children.

3. **ESTOPPEL: Trustee for Life Tenant: Cannot Bind Remaindermen.** A trustee for a life tenant has no more power to bind the remaindermen or their title than the life tenant would have had had there been no trust. Such trustee could not dispose of the remainder by estoppel, or by the ratification of a void deed, any more than she could do it by her own deed.
4. ———: ———: ———: **Receiving Proceeds of Invalid Sale: Knowledge.** Remaindermen entitled to a fee in certain property discharged from a trust under the will of their grandfather, are not estopped to object to an invalid sale of the land by a substituted trustee because they accepted a partial distribution of the estate, made up in part of the proceeds of such sale, they having had no knowledge of the sale when they received the distribution.

Appeal from St. Clair Circuit Court.—*Hon. C. A. Denton*, Judge.

**REVERSED AND REMANDED** (*with directions*).

*J. C. Hargus, George H. Daniel and W. E. Owen*  
for appellants.

(1) While it is held that a testator may authorize his executor or trustee to sell land in a foreign jurisdiction, and that such power may be exercised

without administration in the foreign jurisdiction, yet in such cases the donee of the power acts by the express authority of the will and without the aid of legal process. It is in fact a contractual or vested right in the donee, but even in such case it is uniformly held that the will must be proved and recorded in the State where the land lies, in conformity to its law, before the power can be exercised. 13 Am. & Eng. Ency. Law (2 Ed.), p. 944; *Hines v. Hines*, 143 Mo. 494; *Keith v. Keith*, 97 Mo. 224; *Gaven v. Allen*, 100 Mo. 300; *Cabbanne v. Skinker*, 56 Mo. 367; *Fender-son v. Mo. Tie Co.*, 104 Mo. App. 293. (2) The appointment of Aubrey Pearre as succeeding trustee by the circuit court of Maryland was utterly void as to the Missouri lands, and for several reasons. (3) It is our contention that the power of sale of the St. Clair county land, given in the will of John Sifford, was a personal trust in the named trustees, and could alone be exercised, if at all, by them or the survivor of them as provided in the will; and that as John E. Sifford resigned and refused to sell the land, it passed to Mrs. DeLashmutt for life, with remainder in fee simple to her heirs. The rule is well settled in England and this country, that where an estate is devised to trustees for a particular purpose, the legal estate vests in them so long as the execution of the trust requires it and no longer. *Strong v. Rice*, 27 Pa. St. 75; *Ross v. Parker*, 1 Bran. and Cress. 360; *Mark v. Mark*, 9 Watts, 410; *Stark v. Kirchgrober*, 186 Mo. 642; *Pills v. Sheriff*, 108 Mo. 116; *Roberts v. Massley*, 51 Mo. 282; *Carr v. Dings*, 54 Mo. 95; *Ferguson v. Stephens*, 5 Mo. 211. (4) Treating the will of John Sifford as creating a trust in John E. Sifford, and with absolute direction to sell all of the land and pay the proceeds to the executor for distribution; yet the title of John E. Sifford ceased and determined upon his voluntary resignation, its acceptance by the court of Maryland

and his continued acquiescence in the mandate of said decree. The title was divested out of him, both by the decree of the Maryland court and by the force and effect of section 141, R. S. 1909, hereinbefore discussed. The legal title passed to the heirs and devisees of John Sifford, according to the other provisions and intention of the testator as expressed in his will. *Compton v. McMahan*, 19 Mo. App. 502; *Greenough v. Welles*, 10 Cush. 571; *Sugden on Powers*, 394. (5) The Statute of Limitations could not run against Mrs. De Lashmutt, because she was a married woman, nor against plaintiffs as remaindermen, until the termination of their mother's life estate. *Manning v. Coal Co.*, 181 Mo. 359; *Hall v. French*, 165 Mo. 441; *Shumate v. Snyder*, 140 Mo. 77; *Carr v. Dings*, 54 Mo. 95; *Dyer v. Brannock*, 66 Mo. 391; *Graham v. Ketchum*, 192 Mo. 25. (6) In this case there can be no estoppel against plaintiffs, growing out of the sale of the land by Aubrey Pearre, as several of the essential elements of estoppel are absent under the facts as disclosed. To constitute an estoppel the following requisites must exist: (a) There must be conduct, acts, language or silence amounting to a misrepresentation or concealment of material facts. (b) These facts must be known to plaintiff at the time of their conduct, or the circumstances such as necessarily to impute knowledge. (c) The truth must be unknown to defendants at the time when such conduct was done, and at the time it was acted upon by them. (d) The conduct must be done with the intention or expectation that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be acted upon. (e) The conduct must be relied and acted upon by the defendant. (f) They must have, in fact, acted upon such conduct in such manner as to change their position for the worse and suffer loss. *Pomeroy's Eq. Jur.* (3 Ed.), sec. 805; *Bishop on Contracts*, sec. 300; *Burk v. Adams*, 80 Mo.



504; Bales v. Perry, 51 Mo. 449; Goltermann v. Schiermeyer, 125 Mo. 298; Dameron v. Jameson, 143 Mo. 538; Blodgett v. Perry, 97 Mo. 273. (7) Nor can it be contended that the plaintiffs ever ratified or acquiesced in the sale of the property by Aubrey Pearre. If the party originally possessing remedial rights has obtained full knowledge of the material facts involved in the transaction, has become fully aware of its imperfections and of his right to impeach it, or ought and might with reasonable diligence have become so aware, and he acts deliberately and with the intention of ratifying the voidable transaction, then his confirmation is binding. But if the party wrongfully supposes that the original contract or transaction is binding, or if he has not full knowledge of all of the material facts and of his own rights, no act of confirmation however formal is effectual; the voidable nature of the transaction is unaltered. 2 Pomeroy's Eq. Jur. (3 Ed.), secs. 964, 965, 817 and 818; St. Louis St. Bk. v. Kennett Estate, 101 Mo. App. 398; Purdy v. Bankers' Ass'n, 101 Mo. App. 109; Beland v. Brewing Assn., 157 Mo. 605; Patum v. Holiday's Adm., 59 Mo. 428. Neither estoppel nor acquiescence can bar plaintiffs' right to recover in these cases, for the evidence wholly fails to show that they had full knowledge of the sale of these tracts of land, and of their right to impeach such sale, and with this knowledge received and accepted their share of the purchase money. In fact the evidence does not show that plaintiffs had any knowledge whatever of the sales of these tracts of land prior to the receipt of money from the Sifford estate. (8) There was no actual conversion of the land into money under the will of John Sifford, and consequently nothing to prevent plaintiffs from recovering from defendants their interest in the land. Nall v. Nall, 243 Mo. 255; Gest v. Flock, 2 N. J. Eq. 115; 9 Cyc. 853; Compton v. McMahan, 19 Mo. App. 499.

*W. W. Lawton and Parks & Son* for respondents.

(1) Appellants had both actual knowledge as well as information of facts which if followed would have furnished to them actual knowledge that the moneys they received after their mother's death were in part the proceeds of the sale of the lands in controversy. *Marlow v. Leter*, 87 Mo. App. 584; *Ins. Co. v. Smith*, 117 Mo. 292; *Drey v. Doyle*, 99 Mo. 459; *Roan v. Winn*, 93 Mo. 503; *Sensenderfer v. Kemp*, 83 Mo. 588; *Engeman v. Bank*, 84 Mo. 408; *Speck v. Riggins*, 40 Mo. 405; *Hall v. Tissier*, 15 Mo. App. 306; *Lee v. Turner*, 15 Mo. App. 205. (2) When a sale of land is made, no person can be permitted to receive both the money and the land. It makes no difference whether the proceedings are voidable or wholly void in consequence of the want of jurisdiction. Where an election exists between inconsistent remedies, the party has a reasonable time within which to elect and is confined to the remedy he makes. *Hector v. Mann*, 225 Mo. 248; *Proctor v. Nance*, 220 Mo. 104; *Railroad v. Bridge Co.*, 215 Mo. 286; *Meddis v. Kennedy*, 176 Mo. 200; *Cadematton v. Granger*, 160 Mo. 352; *Fisher v. Siekmann*, 125 Mo. 165; *Ceyburn v. McLaughlin*, 106 Mo. 521; *Greeley v. Bank*, 103 Mo. 212; *McClanahan v. West*, 100 Mo. 323; *Boogher v. Frazier*, 99 Mo. 325; *Austin v. Looney*, 63 Mo. 22. (3) An estoppel binding on an ancestor or trustee is binding on the heir or *cestui que trust*. *Hubbard v. Slavens*, 218 Mo. 598; 2 *Herman on Estoppel*, sec. 787; *Thistle v. Buford*, 50 Mo. 278. Where the owner of the land would be estopped by reason of his own acts and conduct from setting up title thereto, those in privity with him, unless purchasers for value without notice, labor under a similar disability. *Thistle v. Buford*, 50 Mo. 278. (4) The executor has the power to make any disposition of his estate he sees fit and the beneficiaries take it burdened with such con-

ditions as the testator sees fit to place upon it. *Stevens v. DeLaVaul*, 166 Mo. 20; *Carter v. Bolster*, 122 Mo. App. 142. (5) John Sifford's will vested in the trustees the absolute title to the Missouri land, not a mere power to sell. For this reason, the heirs at law and beneficiaries, took no title or interest in the land but only in the proceeds, after passing through the hands of executors. *Compton v. McMahan*, 19 Mo. App. 494; *Marshall v. Meyers*, 96 Mo. App. 643; 28 Am. & Eng. Law (2 Ed.), p. 864; 2 Underhill on Wills, sec. 782, p. 1115; 2 L. R. A. (N. S.) 173, note. (6) Even if the will of John Sifford gave only a mere power to sell and did not vest the absolute title in the trustees, yet the fee was divested by the power conferred and the heirs at law and beneficiaries have no interest in the real estate itself. *Francisco v. Winfield*, 161 Mo. 560; *Williams v. Lobbans*, 206 Mo. 399; *Eneberg v. Carter*, 98 Mo. 647. (7) The trusts created in John E. Sifford, trustee of the title to the Missouri land as well as that in Ann Josephine Sifford, trustee for Cleanthe Eugenia Delashmutt were active trusts; not dry or passive trusts. *Simpson v. Erisner*, 155 Mo. 157; *Simpson v. Jennings*, 163 Mo. 332; *Schiffman v. Schmitt*, 154 Mo. 204; *Walton v. Drumtra*, 152 Mo. 489; 1 Perry on Trusts (5 Ed.), sec. 18; 2 Perry on Trusts (5 Ed.), sec. 475; Underhill on Trusts and Trustees, pp. 13, 14. (8) Where a foreign court has jurisdiction of the subject-matter and persons, its judgment will bind the interest of the parties in lands in this State. *McCune v. Goodwillie*, 204 Mo. 306; *Olney v. Eaton*, 66 Mo. 563; *Austin v. Loring*, 63 Mo. 19; *Proctor v. Proctor*, 69 L. R. A. 685, note; *State ex rel. v. Zachritz*, 166 Mo. 313; *Coney v. Laird*, 163 Mo. 408; *Real Estate Co. v. Laudell*, 133 Mo. 395; *Davis v. Wakelee*, 156 U. S. 689; *Newton v. Brownson*, 67 Am. Dec. 89; *Massie v. Watts*, 6 Cranch, 148; *Penn. v. Hayward*, 14 Ohio, 302; *Gardner v. Ogden*, 78 Am. Dec. 192; *Dale v. Roseveldt*, 5 Johns. Ch. 174; *Mitchell v.*

Burch, 22 Am. Dec. 669; Bunsley v. Stevenson, 23 Ohio St. 474; 11 Am. & Eng. Ency. Law, 167-173; Brown v. Desmond, 100 Mass. 257; 2 Herman, Estoppel, sec. 214, p. 232; Noble v. Grandin, 84 N. W. 465; Kirkland v. Loan Assn., 60 S. W. 149. (9) Whenever the right of action in a trustee who is vested with the legal title is barred by limitation, the right of the *cestui que trust* is also barred whether the *cestui que trust* be *sui juris* or under disability during the period of limitation, or whether entitled in possession, or in remainder, it being also immaterial whether the remainder be vested or contingent. Chase v. Cartright, 53 Ark. 358, 22 Am. St. 207; Meeks v. Olpherts, 100 U. S. 564, 25 L. Ed. 735; Edwards v. Woolfolk, 17 B. Mon. 376; Herndon v. Pratt, 59 N. C. 327; Waring v. Railroad, 16 S. C. 416; Johnson v. Cook, 122 Ga. 524; Smilie v. Biffle, 2 Pa. St. 52, 44 Am. Dec. 156; Barden v. Stickney, 132 N. C. 416, 130 N. C. 62; Williamson v. Beardsley, 137 Fed. 467; Molton v. Henderson, 62 Ala. 426; Dennis v. Bluit, 122 Cal. 111, 68 Am. St. 17; Patchell v. Railroad, 100 Cal. 505; McLeran v. Benton, 73 Cal. 329, 2 Am. St. 814; Wilmerding v. Russ, 33 Conn. 67; Salter v. Salter, 80 Ga. 178, 12 Am. St. 249; Moore v. Armstrong, 10 Ohio, 11, 36 Am. Dec. 63; Long v. Cason, 4 Rich. Eq. 60; Woolridge v. Bank, 1 Sneed, 297; Williams v. Otey, 8 Humph. 563; Collins v. McCarty, 68 Tex. 150; McAdams v. McAdams, 10 Tex. Civ. App. 653; Digman v. Nelson, 26 Utah, 182; Jenkins v. Jensen, 24 Utah, 108; 2 Beach on Trust and Trustees, sec. 669; Wilson v. Trust Co., 44 S. W. (Ky.) 121. In this case the direct and controlling point in question was upon the correctness of the rule referred to by Perry on Trusts and quoted in Ewing v. Shanahan, 113 Mo. 191, and relied upon by plaintiff's counsel, viz.: "It would seem that the *cestui que trust* is entitled to an interest in remainder only, the statutory bar ought not to begin to run against him until his interest falls into a right to the possession of the beneficial or equitable interest."

The Supreme Court of the United States, without a dissenting opinion, speaking by Justice Miller, says this is not the true doctrine, and in passing upon the question state: "Whatever doubt may have existed at one time on the subject, there remains none at the present day, that whenever the right of action in the trustees is barred by the Statute of Limitations, the right of the *cestui que trust* thus represented is also barred. This doctrine is laid down in Hill on Trustees, side paging 267, 403 and 504 and the authorities there cited fully sustain the text, both English and American."

BROWN, C.—This suit was begun by filing the petition in the St. Clair County Circuit Court, October 3, 1907, and summons was taken at the same date. The plaintiffs are the surviving husband and three sons and one daughter of Cleanthe Eugenia DeLashmutt, deceased, a daughter of John Sifford, deceased, who is the common source of all title asserted by any party to the suit. The plaintiffs claim title to  $\frac{19}{150}$  of a tract of land in said county, particularly described as the west half of the southeast quarter of section 7, township 37, range 28. The defendant Teetor claims title to the whole through a conveyance dated April 7, 1893, by one Aubrey Pearre, purporting to act as trustee for Mrs. DeLashmutt as well as administrator with the will annexed of the estate of John Sifford, to one D. L. Dade, for a consideration of \$1000. The defendants Darrow and Henry are beneficiary and trustee in a deed of trust under the Dade title. The other defendants, of whom there are fifteen, are descendants of John Sifford, and would represent all the other interests in the land, if the theory upon which the plaintiffs are proceeding be the true one. They, however, are seeking no relief and do not answer. The theory of the plaintiffs is that the deed of Pearre to Dade is void

for want of power to convey in any of the capacities assumed by the maker.

The amended petition upon which the cause was tried was filed November 14, 1908, and is in two counts. The first count states the interest of the parties in connection with their relationship to John Sifford; that he died testate in Frederick county, Maryland, in 1878, seized of the land; that his will was duly admitted to probate by the orphans' court of Maryland for said county and established as such will by the formal decree of said court; that letters testamentary issued out of said court to his son John Sifford and one John Loats, the only surviving executors named in said will, who thereupon duly qualified, and entered upon the discharge of the duties of said office. Loats soon died, and John E. Sifford became the only surviving executor. "That by said last will all the lands of said testator in St. Clair county, Missouri, were devised to John E. Sifford and two others and the successor or successors of them, in trust, with power to sell and convey all or any portion of said lands as might be considered in the discretion of said trustees for the best interest of said testator's estate, and further to pay over all of the proceeds of such sales to testator's executors to be divided amongst his devisees, including plaintiffs." That the other trustees died without having assumed to execute the powers vested in them by the will, and that John E. Sifford accepted said trust and entered upon the performance of his duties as such trustee.

That John E. Sifford in July, 1885, resigned as executor and refused to act further under said will in that capacity; and thereupon Aubrey Pearre (who had since the execution of the will intermarried with the testator's daughter Ann Josephine Sifford) was by the said orphans' court duly appointed administrator *de bonis non cum testamento annexo*, and qualified and entered upon his duties as such. In 1887 John E.

Sifford filed in the circuit court for Frederick county, Maryland, a court of general jurisdiction, sitting in equity, his petition to be relieved from the trust with reference to the St. Clair county lands, and for the appointment of Aubrey Pearre as his successor. This proceeding was *ex parte*. The court relieved Sifford of the trust and appointed Pearre, who, purporting to act in both capacities of executor and trustee, executed the deed to Dade already referred to. That the will was not filed for record in St. Clair county until February 24, 1904, and no ancillary or other administration on the Sifford estate was ever taken out in Missouri; that the only color of title held by Teetor is through the said deed to Dade, which is utterly null and void. The petition further states that under the will of John Sifford, his daughter Cleanthe E. DeLashmutt was getting a life estate in equity of an undivided one-sixth of all lands of the testator, which was devised to his daughter Josephine Sifford in trust for the said Cleanthe with directions to permit her to use and enjoy the same, and receive the rents, issues and income thereof during her life; that she died March 25, 1903, leaving surviving her her husband, the plaintiff Van E. DeLashmutt, to whom she was married prior to the death of her father, and the other plaintiffs, together with Frank T. DeLashmutt and Gertrude D. Jackson, her children and sole heirs. Frank T. DeLashmutt has since died and Gertrude Jackson has refused to assert any interest in the lands in suit and is made defendant. The petition then proceeds as follows:

“Plaintiffs further state that they each (except Van E. DeLashmutt) and including Frank E. DeLashmutt have received some money from the estate of John Sifford, deceased, paid to them by and through their said mother’s trustee under the will of said John Sifford; and these plaintiffs say that according to their information and belief a portion of the money so re-

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ceived was derived from the proceeds of the sale of the land in suit, but that these plaintiffs have no sufficient knowledge or information concerning same to state definitely what amount or proportion of the proceeds of the sale of said land have been received by them or any of them.

“And these plaintiffs say that having no right to participate in the bequests and devises so made by John Sifford to Cleanthe E. DeLashmutt until after her death in 1903, that they had no knowledge or information as to the manner and method in which the land in dispute had been disposed of, or whether disposed of at all, and did not know and were not advised that said land had been disposed of by said Aubrey Pearre in the illegal manner hereinbefore set out; and they were first advised of the facts aforesaid as to the manner and method of the sale of the said land in suit during the year 1905, and after a portion of the money held by Cleanthe E. DeLashmutt’s trustee had been received and receipted for as hereinbefore recited.

“Plaintiffs further state that defendant G. O. Teetor, by mesne conveyances, derives his pretended title to said land from said D. L. Dade, and that said land is reasonably worth the sum of \$2800, or an increase of \$1800 over the consideration paid the said Aubrey Pearre by said D. L. Dade for said land; and there is now an existing deed of trust on all said land in favor of Hez H. Henry, beneficiary, and F. L. Darrow, as trustee therein, for the sum of \$1600, placed on the land by the grantees of said D. L. Dade, and for this reason said Henry and said Darrow are made parties to this suit.

“Plaintiffs further state that the rights and equities existing between them and the defendants herein cannot be determined or adjusted in a suit at law, and that they have no adequate remedy in a court of law, and that they hereby invoke the aid of the powers



of this court of equity to adjust the rights, interests and equities in and to said lands as between plaintiffs and defendants.

“Plaintiffs further aver that the fair and reasonable rental value is now, and has been since the pretended sale thereof by Aubrey Pearre to D. L. Dade, the sum of \$1.50 per acre per year; and plaintiffs here now offer to do and perform toward defendants such equity as to the court may seem just and right under the facts which shall develop in this cause.

“Wherefore, plaintiffs pray the court by its judgment and decree to ascertain, determine and define as between plaintiffs and defendants the title to said land; and to ascertain, determine and define that plaintiffs are entitled to an undivided  $\frac{19}{150}$  interest in fee in and to the land in this suit involved as against the defendant G. O. Teetor and that said interest be divested out of said Teetor and fully vested and perfected in these plaintiffs; and in order to prevent further litigation that this court of equity award to plaintiffs a writ of restitution and possession for their interest in said land as ascertained by this court; and plaintiffs pray for such other, further or different orders, judgments and decrees as to the court shall seem just, right and equitable in the premises as between them and defendant Teetor; and in this connection and in order that the court may do complete, full and ample justice between the parties litigant, plaintiffs ask that the court ascertain the amounts received, if any, by plaintiffs out of the purchase money paid by such Dade for said lands and the amount, if any, that should now be chargeable against plaintiffs and in favor of defendant Teetor, by reason of such sums and taxes paid by said Teetor or his grantees, and to charge said Teetor and his grantees with fair and reasonable rent as shall be just and right, and on stating such account to make such orders and decrees touching the settlement of same as shall be just and right. And

plaintiffs say that in the event that the court shall deem it inequitable and unjust to defendant Teetor to deprive him of any portion of said land, but that said Teetor should be permitted to retain all of said lands and account to plaintiffs for their interest and share therein, then these plaintiffs are willing to release and surrender to defendant Teetor all of their right, title and interest in said lands upon defendant fully accounting to them for the fair and reasonable value of said land increased or diminished by the accounting between them as found by the court, and plaintiffs are willing to receive such sum of money as to the court shall seem just and right under all of the facts in this cause.

“And as against defendants F. L. Darrow and Hez G. Henry, plaintiffs say that they are entitled to a decree, finding and determining that said deed of trust is not a lien upon or against plaintiffs’ interest in said land, either in kind or in any sum adjudicated due plaintiffs, and that as against them and their interest in said land, said deed of trust and the debt evidenced thereby be ordered and decreed canceled and for naught held; and plaintiffs say that the value of said lands is so greatly in excess of the amount of said debt that the beneficiary under said deed of trust will not be endangered in the collection of his said debt; and that said defendants be divested of all and any apparent interest and title in and to said land as against these plaintiffs and their interest in said land.”

The second count of the petition repeats or adopts the facts stated in the first count and prays “for a decree finding and determining their interest in said lands, finding and stating an account between plaintiffs and defendants, and decreeing partition of said lands, and appointing commissioners, and decreeing plaintiffs’ interest in said land free from the lien of said deed of trust and that the same is valid only as

against the interest of said Teetor herein, and for such other orders, judgment and decrees in the premises as to the court shall seem right, just and equitable.”

The answer states substantially as it is stated in the petition the acceptance by John E. Sifford of the trust created in the will, together with his appointment and resignation as executor, and the appointment of Pearre as his successor, his application in 1887 to the circuit court for Frederick county, Maryland, a court of general equity jurisdiction, to resign as trustee, and his petition for the appointment of a successor; his refusal to act further; the acceptance of his resignation and appointment of Aubrey Pearre his successor as trustee; acceptance by Pearre of the appointment; and that the latter continued to act as such trustee until the St. Clair county lands were all sold, and turned over the proceeds to himself as administrator *de bonis non* of the estate. The answer then proceeds as follows:

“Defendant further states that the said Aubrey Pearre as said administrator of the will annexed of the estate of said John Sifford, received from said trustee the proceeds of the sale of said real estate, and in accordance with the provisions of said John Sifford’s will, distributed the same among and to the beneficiaries under said will, including the plaintiffs to this action, and that said beneficiaries, including plaintiffs, with full knowledge of all the foregoing facts as above set forth, received and receipted for the same, and that by reason of the premises and said conduct of said beneficiaries as well as under said conveyance, this defendant is now the owner of said real estate, and plaintiffs are estopped thereby to assert title to said real estate.

“2. And further answering in this cause, defendant adopts without repeating the several allegations in the first count or paragraph of this answer, and avers that there is a defect of parties to this cause in

this: (a) that the lands in controversy were devised in trust to trustees named in the will of John Sifford, deceased, and plaintiffs aver that successor in trust has never been appointed, and if in that event the appointment of Aubrey Pearre is held to be void, then the original trustees named in the will, and in the event of their death, their heirs are necessary parties to this action; (b) that the trustee for Cleanthe E. DeLashmutt during her lifetime and upon her death for the children of said Cleanthe, is not alleged to have ever conveyed to said children, and for that reason is a necessary party to this action.

"3. And further answering in this cause defendant adopts without repeating the several allegations in the first count or paragraph of this answer, and avers that plaintiffs' alleged cause of action did not accrue within ten years next before the filing of the original petition in this cause and is barred under the Statutes of Limitation in this State."

A copy of the will of John Sifford with the proof taken in the orphans' court for Frederick county, Maryland, and its order establishing the same and admitting it to probate, is filed with the answer. The devise to John E. Sifford and others as trustees is as follows:

"I give and devise to my son John E. Sifford and my sons-in-law John Loats and John I. Boyd, of the State of Maryland, all my lands, tenements and real estate situate in St. Clair county, Missouri, to them, their heirs and assigns upon the following trust:

"Nevertheless upon trusts that they, or the survivor, or survivors of them, shall sell said lands and real estate in whole or in parts, at public or private sale, and upon such terms, and at such times as they or the survivor, or the survivors of them, shall deem most advantageous to my estate, and upon the further trust and with full power and authority in them, or the survivors or survivor of them, to convey said lands

when sold to the purchasers or purchaser by a good and sufficient deed or deeds, and upon the further trust to pay over the proceeds of such sales to the executors hereinafter named and appointed by this, my will, or to the survivors or survivor of them, to be by my said executors, the survivors or survivor of them, distributed according to the provisions of this, my will, among the legatees therein mentioned."

The will also contains the following clause:

"I give and bequeath to Ann Josephine Sifford, one other seventh part of my estate, in trust to invest the same, or such part as she may in her discretion think fit, in real estate within or without the State of Maryland, and to permit my daughter Cleanthe De-Lashmutt to occupy the said real estate and to take and receive to her own, sole, separate and exclusive use during her life, the issues, rents and profits thereof, and upon the further trust in case my said daughter shall not occupy my said real estate, either to sell the same, or to rent out the same, and if sold, to reinvest the same from time to time in other real estate and to pay over the rents, issues and profits thereof, to my said daughter Cleanthe for and during her life, and for her sole, separate and exclusive use and benefit. And upon the further trust to invest any portion of this bequest not invested in real estate in such securities, public or private, as she may deem best, vesting in said trustee full discretion as to said investments, with power to call in said investments and from time to time reinvest the same, and upon the further trust to pay my said daughter Cleanthe for and during her natural life the income from such investments for her own sole, separate and exclusive use free from the marital rights of her present or any future husband. And from and after the death of my said daughter Cleanthe, in trust, to convey to her children now born or hereafter to be born, the real estate held under the provisions of this clause of my will and to transfer and

hand over to such children the investments held under this clause of my will." His son John E. Sifford, his daughter Mrs. Loats and his sons-in-law John Loats and John I. Boyd were named as executors. By a codicil the share so disposed of became one-sixth instead of one-seventh.

Issue was taken by reply to the new matter in the answer.

Mrs. Cleanthe Eugenia DeLashmutt died March 25, 1903, at Shelburn, Sullivan county, Indiana, where she (with her husband and all the members of her family except her oldest child, Mrs. Jackson, who remained in Baltimore, and John S., who went to Ohio before 1888, and resided at different places in that State), had settled upon leaving Pennsylvania, and resided ever since. At the time the family moved to Indiana, the youngest child, Mrs. Mills, was about three years old, and the oldest, Mrs. Jackson, about thirteen. The plaintiff John S. was then about nine years old, and Oscar six years old. The estate of John Sifford had been fully administered and distributed and the final settlement of Pearre was approved and passed June 8, 1897. John E. Sifford died in 1904.

While Mr. Pearre testified that after his appointment as trustee by the Frederick Circuit Court in Maryland, and in 1888 or 1889, he made "one or two" visits to St. Clair county, Missouri, and stopped off at the DeLashmutt home in Shelburn, Indiana, and discussed with the whole family his sales and proposed sales of land in St. Clair county, the DeLashmutts all say that during the visit he did not talk about any sales he had made or was going to make, but did say that he was going to Missouri to recover some lands that had been sold or thrown away by John E. Sifford, administrator, and spoke about bringing suits for it. They also say, in substance, that the first information they had that any of the lands had been sold was about three months after their mother's death when they re-

ceived a quitclaim deed for their signature covering some of these lands which were said to have been sold to one E. S. Knowles. This was returned without signing.

On August 7, 1903, Mr. Pearre wrote John S. DeLashmutt the following letter about the estate left in Mrs. Pearre's hands at the death of Mrs. DeLashmutt:

"8/7 3.

"J. S. DeLashmutt,  
811 S. Sandusky Ave.,  
Bucyrus, O.

Dear Nephew:

"Yours of July 30th to hand. Your mother's estate consists of \$5000 in bonds and the property in Shelburn, Ind. This property stands in the name of Aunt Nannie J. Pearre. Out of the property \$500 is to be returned to the Loats Orphan Asylum, Frederick City, Md. Your sisters have \$500 each in it. My understanding is that the Shelburn property belongs to your sister, after the Loats asylum gets its \$500. If that is the case, the only other property is the 5 bonds of \$1000 each to divide between the 5 heirs, or one bond to each heir. I will send you the bond, or sell it, and send you a ok. with statement of sale. You can send me a receipt in full for your interest in your mother's estate, or account just as you may view the status of the property in Shelburn. Make the receipt to Anna J. Pearre, nee Sifford, Trustee.

"Your aunt is absent until September. Also your sister, Mrs. Jackson, or I would confer with them.

Very truly yours,

A. PEARRE."

On April 26, 1904, he wrote the following:

"4/26/04.

"Mr. J. S. DeLashmutt,  
811 S. Sandusky Ave.,  
Bucyrus, O.

Dear Nephew:

"Referring to your favor of the 25th, would say the bond you would get is one issued by the city of Montgomery, Ala. It is a 5% bond, has only two or three years to run before maturity. It should bring 101 or \$1,010:00/100. I have four of these bonds, and one of Va. Midlands, which is at a premium of \$12%. Whoever takes this bond will have to pay this premium, or enough to equalize this bond down to the value of the others, and this excess premium will be divided with the other heirs. I will see that your interest is protected.

"I wrote you yesterday, enclosing a 'quitclaim Deed' from Mo. This land was sold some twenty years since, and the money paid to us for it—the letter will explain. When this paper arrives, please execute it with Mrs. DeLashmutt and return—you will place me under obligation. Hoping your health will improve rapidly under the operation to which you refer, and with kindest regards to family, I remain,

Very truly yours,

A. PEARRE."

Along with this quitclaim deed, which was the same sent them in the summer of 1903 from Osceola, was a check to each of them for \$1019.20 and a receipt for same substantially like that signed by Frank T. DeLashmutt, which is follows:

"Baltimore, 5/13/04.

"Received of Mrs. Anna J. Pearre, Trustee, one thousand nineteen 20/100 dollars—first installment of my interest in the estate of my grandfather, Jno. Siford, deceased—said interest having been held in trust



for the use of my mother, Cleanthe DeLashmutt, during her natural life.

\$1,019-20/100

FRANK T. DELASHMUTT."

The checks were accepted, and the receipts were signed and returned to Mr. Pearre, but the quitclaim deed was held for investigation; all of which called forth the following letters from him:

"5/24/04.

"Mr. Frank T. DeLashmutt,  
Shelburn,  
Sullivan Co., Ind.

Dear Sir:

"I have a letter from your brother, J. S. DeLashmutt, stating he is holding the 'Quit Deed' on request from Shelburn, as the parties there are looking into it. And are also holding. If my statement is not worth believing, or if you have to defend your interests from me, I don't care to continue my correspondence with you.

Very truly yours,  
AUBERY PEARRE."

"P. S. You can continue your correspondence with J. B. Egger, Appleton City, Mo."

"5/24/04.

"Mr. Jno. S. DeLashmutt,  
Dear Nephew:

"Your letter with receipt to hand. Accept thanks for candor regarding the Quit Deed. I have written Shelburn that if my word is worth nothing and they have to defend their interest from me, I don't care to communicate again with them, and have referred them for further correspondence to J. B. Egger, Appleton City, Mo. I have been working for their interest for the past twenty years, without even my postage stamp paid. Have thrown into your mother's estate \$500 commission to which your aunt is entitled as trustee;

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and I don't care now to be regarded as one from whom you are compelled to defend yourself.

Very truly yours,

AUBERY PEARRE."

All the living heirs of Mrs. DeLashmutt, excepting Mrs. Jackson, who did not testify, swore positively that they never ascertained until after the distribution in 1904, that any of the St. Clair county lands had been sold by Mr. Pearre, and that they did not know that any of the money which they received from Mrs. Pearre in that year was realized from the sale of any of those lands.

I. Both parties, plaintiffs and defendants, claim the land in controversy under John Sifford, the common source of title. Both claim through **Real Property:** his will; the plaintiffs as remaindermen  
**Law of Situs.** in fee after an equitable life estate in their mother, Cleanthe Eugenia DeLashmutt, and the defendants through a deed from Aubrey Pearre purporting to act in its execution both as executor of the estate of John Sifford, and as trustee under the will, to one D. L. Dade, under whom, by mesne conveyances, the defendant Teetor, the occupying claimant, derails his title. The defendant Teetor also says that the plaintiffs are barred by the Statute of Limitation by reason of the adverse possession of himself and those under whom he claims for more than ten years and that they are estopped from disputing his title by participation in the proceeds of the sale under which he claims. The force and effect of the Pearre deed is, therefore, the first question presented by the record.

II. It is not to be conceived that any government would permit the title to the lands which constitute the foundation and define the territorial limits of its

sovereignty, to depend upon the operation of the laws of any foreign State or Nation. Real estate transfers of every description, whether by act of the parties or by operation of law, depend, for their validity and effect, upon the laws of the jurisdiction in which the property is situated. Suits affecting the status of lands are local to the situs of the property. As is said by WRIGHT, J., in *Companhia de Mocambique v. British South Africa Company*, [1892] 2 Q. B. 358, 366, "it is a general principle of jurisdiction that title to land is to be directly determined, not merely according to the laws of the country where the land is situate, but by the courts of that country, and this conclusion is in accordance with the rule ordinarily adopted by the jurisprudence of other countries. See Story's *Conflict of Laws*, secs. 551-5." In the citation quoted, Mr. Story says: "Real actions ought to be brought in the place *rei sitae*; and this is the rule, not only when the property in controversy is situate in the same kingdom, but also when the parties, being domiciled in one country engage in a litigation as to property locally situate in another country. If therefore a judgment should be rendered in one country respecting property in another, it will be of no force in the latter." The author then quotes from Vattel, who, in treating of controversies relating to estates in land, says: "In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the State in which it depends." The existence of government requires that it be supreme in the control of persons and things within its territorial jurisdiction, and it is inconsistent with that supremacy that any other sovereignty should be permitted to exercise any governmental function within its limits. It is by these principles that we have to judge the Pearre deed.

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By his will John Sifford devised his St. Clair county lands, of which the tract in controversy formed a part, to his son John E. Sifford and two others (the other trustees having died before the probate of the will, it is not necessary to bear them in mind in this connection) and to their heirs and assigns, in trust that they or the survivors or survivor of them sell and convey said lands and turn over the proceeds to his executors, to be distributed according to the provisions of his will. The will was probated and this trust accordingly became effective November 8, 1878. On October 31, 1887, John E. Sifford presented an *ex parte* petition to the circuit court of Maryland for Frederick county, a court of general law and equity jurisdiction then sitting in equity, declining to further execute his said trust and asking to be relieved of the same, and the court then made an order "that John E. Sifford be, and he is hereby, at his own instance, relieved of the trust referred to in the will of John Sifford, deceased, and that Aubrey Pearre be and he is hereby appointed trustee in his place and stead, for the same uses and trusts." It was under this authority that he made the deed; for although it recites his capacity as administrator with the will annexed, the defendants' counsel do not suggest that it adds anything to its effect. It must stand upon his title and power as an instrument of the Maryland court executing its orders in this jurisdiction or not at all. The respondent has favored us with citations of our own decisions, including *McCune v. Goodwillie*, 204 Mo. 306, to sustain the power of the trustee of the Maryland court to convey, if not to hold, the title to the Missouri land. They do not reach the question now under consideration. They simply hold that, the court having jurisdiction of the subject-matter of the suit and of the parties, the judgment will conclude them, even upon such questions as may affect their tenure of foreign lands. On the other hand, the jurisdictional line in such cases has been

closely drawn in the recent case of *State ex rel. v. Grimm*, 243 Mo. 667. It follows that the Pearre deed was ineffectual to transfer the title to the land in question.

III. Defendants Teetor, Darrow and Henry who alone answered, say that although the court held that the sale and conveyance by Pearre to  
**Conversion.** Dade is void for want of power in the former as trustee under the will of Sifford to make it, and that there was therefore no actual conversion of the land into money, yet by the terms of the will an equitable conversion took effect at the time of the death of the testator. Although the respondents do not advise us as to the effect of this upon their own rights, the inference is that the land, the real subject of the litigation, has fallen from under the appellants, leaving them no foundation to stand upon other than some proceeding to secure the sale of the property in accordance with the terms of the will. As this question affects both the rights and remedies of the parties it requires consideration.

One may, by the provisions of his will, convert real estate into personalty whenever his plan of distribution of his estate among his creditors and the objects of his testamentary bounty requires it, and this is, perhaps, most frequently and simply done by an absolute requirement that the land be sold and the proceeds applied by the executor to the payment of debts and legacies, or for apportionment under the statutes of distribution among the next of kin. The conversion, that is, the change in the nature of the property from real estate to personalty, then takes place at the moment of the testator's death. It is subject, however, to be reconverted to its original character in various ways. One of these is by the election of the ultimate and absolute owner under the will, being at the time *sui juris*, before the sale of the land, to take it in its

original state. This is of course reasonable, for the right to make any lawful use of one's own is the fundamental idea of property. Reconversion also results from the failure of the purpose of the conversion; for if that purpose is or becomes impossible, unlawful or sometimes inexpedient, so that it cannot or ought not to take place, the fiction, which is a favor of the law, fails with the failure of its reason. [Underhill on Wills, sec. 715 et seq.] In this case the testator devised the land in controversy to his son John E. Sifford and his sons-in-law John Loats and John I. Boyd, "upon trusts that they, or the survivor or survivors of them, shall sell said lands in whole or in parts at public or private sale and upon such terms and at such time as they or the survivor or survivors of them shall deem most advantageous to my estate." This power is highly discretionary. It exhibits the most perfect confidence in the judgment, reliability and integrity of these three relatives and in each of them. One of the principal impressions we receive from the language quoted is that the personality of these men must have greatly influenced the testator in clothing them with so important a power, and that this confidence is an important element in the legal interpretation of this part of the instrument. The devise is also made "upon the further trust; and with full power and authority in them or the survivor or survivors of them to convey said lands when sold to the purchaser or purchasers," and upon the further trust to pay over the proceeds to his executors, to be distributed according to the provisions of the will. This trust consists of the naked power and duty to sell the land when and as they shall deem best and to turn over the proceeds to the executor for distribution. They are invested with the legal title for that purpose only. They have under the provisions of the will no right to the possession, direction or management of the land in any respect whatever, and by the failure of that use it reassumes its ori-

ginal quality as realty, and the legal estate only remaining in the trustees, it becomes vested by the Statute of Uses (R. S. 1909, sec. 2867) in the person or persons entitled to the equitable estate under the will, which was, in this case, during the lifetime of Mrs. DeLashmutt, Ann Josephine Pearre. Whether this situation arose at any time before the bringing of this suit is the question.

Three of the executors named in the will were named as trustees for the sale of these lands. A good reason for the exclusion of the other, Mrs. Loats, was that she was a married woman, which would introduce an unnecessary legal complication into the situation, as well as impress upon her a duty in connection with the sale of lands situated so far from her home which might be so onerous as to amount to an imposition; so that, in effect, a committee of the executors was invested with the legal title for the benefit of all; that is to say, for the performance of a duty for all in the collection of the estate. Had this power been vested in the executors themselves as such there can be no question that it must have been executed during their continuance in office or not at all. [Donaldson v. Allen, 182 Mo. 626, 647; Francisco v. Wingfield, 161 Mo. 542; Littleton v. Addington, 59 Mo. 275.] In the case we are considering it is the necessary intention of the testator to limit the power to the period included in the execution of his will, because its exercise was made a part of such execution and the money was to be paid to the executors for disposition in the performance of their official duties as such. The trust was evidently created because they could not perform those official duties in a foreign State, and to avoid the costs and intermeddling of strangers that would necessarily result from the appointment of ancillary administration with the will annexed in this State. It was evidently the intention that when the power of the executors to receive the money from their trustees should cease, the

power of the trustees to raise it and pay it to them should also cease. The Maryland court evidently had this idea in mind when it attempted to appoint Mr. Pearre, then sole administrator of the Sifford estate with the will annexed, sole trustee for the sale of these lands. When the activities of Mr. John E. Sifford as trustee for the actual conversion of this land into money for the benefit of the estate had ceased with the extinguishment of the estate itself by final distribution, settlement and discharge of the administrator, the legal title to that part of the one-sixth interest in the land remaining unsold passed to and vested, by the terms of the will, in Mrs. Pearre, in trust for Mrs. DeLashmutt during her life, and at her death, to convey it all to her children. The Statute of Uses having made this conveyance a work of supererogation, the title to all lands constituting the one-sixth part of the Sifford estate so held in trust for Mrs. DeLashmutt during her life, became fully executed in her children. The power of sale having died with its only object, the sole surviving trustee also died and with him the last of the instrumentalities of the trust disappeared. We accordingly hold that at the time of the institution of this suit, the title to the DeLashmutt interest in such of the Missouri lands as were unsold had vested in the parties ultimately entitled to the estate under the will free from the trusts created by that instrument in John E. Sifford and his heirs and Ann Josephine Sifford, afterward Pearre.

IV. Perhaps the most difficult of the many interesting questions presented in this record, arises upon the plea of defendants that plaintiffs are estopped in equity from disputing the validity of the sale because the one thousand dollars for which the land was sold was accounted for by Pearre as administrator of the John Sifford estate, and was included in the final distribution, in

**Estoppel:  
Knowledge.**



which one-sixth of the entire amount remaining in his hands, and in which it was included, was paid over by him to his wife as trustee for Mrs. DeLashmutt, upon whose death it was distributed among her children, including these plaintiffs.

We have already said that Mrs. Pearre's trust included no duty toward the DeLashmutt children other than to turn over the property to them upon the extinguishment of the equitable life estate of their mother. It then became her duty to account for and deliver to them the personal property. For this purpose she occupied no different position than would the administrator of the life tenant had no trustee intervened. As for the real estate, it automatically vested in fee in the life tenants as tenants in common, by force of the Statute of Uses. Being trustee of the life estate alone, she had at no time any power to bind the remaindermen or their title in any way that her beneficiary, the life tenant, could not have bound them by her acts had no trustee intervened. She could not, of course, dispose of the remainder by estoppel, or the ratification of a void deed, any more than she could do it by her own deed. She could not do by indirection what she had no power to do directly. The whole matter resolves itself into the question whether, as pleaded in the answer, the plaintiffs by receiving the money sent them by Mrs. Pearre in the spring of 1904 to apply upon their respective interests in that part of their grandfather's estate held by her for the use of their mother during her life, have estopped or otherwise disabled themselves from recovering their interests in these lands.

Equitable estoppel, or estoppel *in pais*, is that condition in which justice forbids that one speak the truth in his own behalf. The law has adopted the latter term from the old French *estoupail*, meaning a bung; and it indicates that in such a case one's mouth is plugged against the flow of truth. A healthy instinct

immediately suggests that it cannot be under all circumstances that one is deprived of the use of so clean a weapon, even in defense of his own. We do not have to go to the special books of the law for information on this point, for it is, as it should be, the learning of all. Webster, in his dictionary, defines "*estoppel in pais*" or "*equitable estoppel*" as that "which, when a party by his conduct or language has caused another reasonably to believe in the existence of a certain state of things, and (having a legal right so to do) to act upon the belief, precludes him from averring or setting up, to the prejudice of the latter, that a different state of things existed at the time in question." The act or conduct invoked as an estoppel may be the simple failure of the one against whom it is invoked to speak when it is his duty to do so; but whether his conduct be the result of negligence or design, it may be corrected before the party invoking it has acted upon it to his prejudice. These elements of definition have been incorporated in all the law dictionaries where they may be found under the heading of estoppel. Nor do the textbooks overlook them. [Bigelow on Estoppel (3 Ed.), 484.] And the wealth of adjudication to the same effect in this court is, from the standpoint of right and justice, extremely gratifying. [Taylor v. Zepp, 14 Mo. 482; Newman v. Hook, 37 Mo. 207; Bales v. Perry, 51 Mo. 449, 453; Austin v. Loring, 63 Mo. 19; Acton v. Dooley, 74 Mo. 63, 69; Blodgett v. Perry, 97 Mo. 263; 273; Burke v. Adams, 80 Mo. 501, 514; Monks v. Belden, 80 Mo. 639, 642; Gentry v. Gentry, 122 Mo. 202, 221; Bank v. Ragsdale, 171 Mo. 168, 185; Spence v. Renfro, 179 Mo. 417, 422; Harrison v. McReynolds, 183 Mo. 533, 547 et seq.; Keeney v. McVoy, 206 Mo. 42, 57 et seq.]

In all these cases, except, perhaps, the first two, in which the point was not involved, it is held that another element must enter into estoppel. In the case last cited it was said by Judge LAMM for the court that

the act relied on must have been made with knowledge, actual or virtual, of the facts. In *Harrison v. McReynolds*, supra, Judge GANTT, in applying the same principle to a case of ignorance of her *legal* rights on the part of the one against whom estoppel was alleged, quoting from *Acton v. Dooley*, supra, said: "If no one has been misled to his hurt, if no injury has arisen from the conduct, declarations or silence of a party, he will not be estopped from contradicting them, even though they would be conclusive against his right if uncontradicted. . . . But there is no such thing as estoppel *in pais* for neglecting to speak or act when the party did not know the facts which if known would have made it his duty to speak or act." That case is instructive on the very point involved in this. In 1877 Mrs. Grubb was the owner of an interest in the tract of land involved in the suit, and joined with her husband in attempting to convey it to the plaintiffs, receiving full consideration therefor. By mistake in the description of the land the conveyance failed, and it was held by this court (in *McReynolds v. Grubb*, 150 Mo. 352) that it could not be corrected in equity. After the death of her husband it was asserted that Mrs. Grubb, while a widow, had received personal property in satisfaction of her claim for this same land and was estopped from asserting her title. In disposing of this point adversely to the claim, this court (p. 549) said: "Mrs. Grubb's title to the undivided one-fourth in the northwest of the southeast quarter, was of record, and directly in the chain of title of defendants from their father. By the slightest diligence they could have ascertained if Mrs. Grubb had conveyed her interest. The search to that extent would have disclosed the mistake which they claim was made, and before dividing the land they could have ascertained her rights. We have already ruled that neither a court of law nor equity could correct such alleged mistakes because Mrs. Grubb was at that time a married

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De Lashmutt v. Teetor.

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woman and her estate a legal one and not her separate estate." This recognizes another well established rule applicable to such cases. The party invoking the estoppel must himself be ignorant of the title of the other. In *Austin v. Loring*, supra, this court expressed the same rule as follows: "If no one has been misled to his damage, if no injury has arisen from the conduct, declarations or silence of a party, he will not be estopped from contradicting them, and a party will not be allowed to avail himself of an estoppel when he knew or had the same means of knowledge as the other party." We had also expressed the same idea in *Bales v. Perry*, 51 Mo. l. c. 453, as follows: "If, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel." And again in *Spence v. Renfro*, 179 Mo. 417, 422, we said: "So if the facts be known by both parties, or if they have equal means of ascertaining them, there can be no estoppel." If one's deed be on record he may safely remain silent. [*Spence v. Renfro*, supra; *Bales v. Perry*, supra; *Harrison v. McReynolds*, supra.]

Although the defendants pleaded these matters as an estoppel in equity, they now say that the receipt of this distribution from their mother's trustee was a ratification or confirmation of the void sale by Pearre. Mr. Bigelow in his careful treatise, to which we have already had occasion to refer, says (p. 493) that the most acquiescence or ratification can do "is to supply an element necessary to the estoppel, and otherwise wanting as, e. g., knowledge of the facts at the time of making the representation." This is a way of saying that, while "estoppel by conduct" may result from negligence in that concerning which we owe care to others, the first element in the making of contracts is the meeting of the minds of the parties. Whether they come into existence by adoption, acquiescence or ratification, or by the more ordinary process of origi-

nal execution, there must exist the ground of knowledge on which these may meet. To this ground each is held to contribute those matters peculiarly within his own knowledge. For example, should a man steal my horse, and come afterwards and sell it to me for cash, being able to do so because, perhaps, I had never seen the animal, or, had I seen him, could not recognize him, ought the law for that reason charge me with acquiescence in the theft? Would it be too much to say that in holding that I was estopped by acquiescence from denying the title of my vendor, the law would reduce itself to the position of an accomplice with the wrongdoer? Another example will recommend itself to the personal experience of every country lawyer who practiced in Missouri when its rural counties consisted largely of wild lands, owned by non-residents, many of whom were poor, perhaps soldiers of the Mexican war and their widows and children. In those days enterprising people kept agents in these counties whose names were household words as bidders at tax sales, and other agents in the field to look up and compromise with owners over whose titles they had spread the shadow of their purchases. Upon the enactment of the Revenue Law of 1877 the payment of the taxes was no longer a defense against the sale. When at the instance of the purchaser the owner was notified of the judgment and sale and that the surplus was awaiting him in the hands of the court, many of these who could not afford to obtain copies of the record and legal advice and relied upon the statements of those whose duty it was to inform them of the true facts, have been constrained to save from the wreck the little surplus. Is it right that upon ascertaining that they had been deceived and that the judgment had been a nullity, they should not be permitted to return the money to those who had deceived them, who had taken it knowing and concealing the facts, and retain their own? This question, it seems to us, answers itself; and it is

also answered by a line of authorities which are a credit to our jurisprudence.

V. Applying these principles to the case in hand. The plaintiffs, then little children, left Pennsylvania with their father and mother, Doctor DeLashmutt and wife, before their grandfather had written the will which made this small provision for them. They established their home at Shelburn, Indiana, where the family continued to reside up to the death of the mother in 1903, when, as we have pointed out, the property in question became vested in them under their grandfather's will. There is nothing in the record to indicate that either of them had ever seen their aunt's husband, Mr. Pearre, who sold the land in question, excepting on two occasions when he came west on his way to Missouri to look after these lands. He was not a member of the family when they left Pennsylvania. His talk with the DeLashmutts at the time of these visits is a matter of dispute. He says he told them that John E. Sifford had sold some of the Missouri lands and that he himself intended to sell the remainder; while they say he told them that Sifford had thrown away some of them, and that he was going to recover them. They all insist that they never knew nor heard that he had ever sold or attempted to sell any of the lands in Missouri until after the final distribution. Doctor DeLashmutt testifies that prior to any visit of Mr. Pearre to his home he had written to "the bondsmen" (meaning, no doubt, the bondsmen of the executor) "forbidding them selling the land or lands of John Sifford, deceased, away from the children."

On May 13, 1904, each of the plaintiffs on receipt of the funds expressed in it gave Mrs. Pearre a receipt in the following form:

"Received of Mrs. Anna J. Pearre, Trustee, one thousand nineteen 20/100 dollars, first installment of

my interest in the estate of my Grandfather, Jno. Sifford, deceased, inherited through my mother Cleanthea DeLashmutt."

It is not even claimed that up to that time these parties had ever seen any letter, deed or other writing referring to the sale of any of these lands by Pearre.

On April 26, 1904, Mr. Pearre wrote J. S. DeLashmutt among other things as follows: "I wrote you yesterday enclosing a quitclaim deed from Mo. This land was sold some twenty years since, and the money paid to us for it—the letter will explain. When this paper arrives, please execute it with Mrs. DeLashmutt and return—You will place me under obligation." This deed was to one Knowles, and covered a tract of the St. Clair county land that had been sold to him by John E. Sifford as trustee. The quitclaim was held by J. S. DeLashmutt for investigation, which so irritated Mr. Pearre that he wrote that if his statement was not worth believing or if they had to defend their interests from him, he did not care to continue his correspondence with them, and referred them to J. B. Egger at Appleton City, Mo.

This reticence and extreme sensitiveness to inquiry does not argue strongly in favor of the proposition that he was ready and willing to explain when called upon.

The young men took him at his word, came to St. Clair county, investigated the matter, and, without any unreasonable delay, as it seems to us, brought this suit. They find, as they say in their petition, that the purchase price paid for this land was included in the distribution of the Sifford estate and ask for an accounting in which their share shall be charged against them. There is nothing in the papers or correspondence attending the distribution of the DeLashmutt fund which indicates notice to the distributees that any part of it resulted from a sale of any part of these lands by

Pearre, and the testimony of the parties who know preponderates greatly against that conclusion.

That the defendants who answer and claim the land knew the character of the sale and conveyance under which they claim, and which appears fully of record, is not only a fact but a legal conclusion, which the law will not permit them to deny, and nothing can be more reasonable and just than the rule which denies them the right to shift the burden of their own carelessness to the shoulders of one innocent of all participation in the transaction, without a full disclosure of the facts. The plaintiffs say in their pleadings that they want nothing but to be reimbursed their loss through the illegal sale, and there is nothing more just than that this should be done by those who, with a knowledge, both actual and imputed, of all the facts, have received the property.

There is nothing in *Hector v. Mann*, 225 Mo. 228, nor in the line of cases it cites in its support, inconsistent with the view we have taken in this case. They simply hold that in case of execution and judicial sales a party to the suit who, with knowledge of all the facts affecting his rights, takes down a surplus of the purchase price coming to him from the sale on the theory of its validity, thereby ratifies the proceeding to the extent of the part so adopted. The principle does not apply to this case.

VI. We have already in the previous paragraph disposed of the Statute of Limitations pleaded by the defendants upon the theory that John E. Sifford and Mrs. Pearre were active trustees for the DeLashmutt children so that the statute running against them or either of them operated vicariously upon these plaintiffs. There having been no such relation, as we have already shown, the conclusion founded upon it falls. The plaintiffs are, therefore, not barred.



The judgment of the St. Clair Circuit Court is reversed and the cause remanded with directions to proceed to an accounting and final judgment in accordance with the views herein expressed.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur, *Bond, J.*, in result.

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THE STATE ex rel. the COLLECTOR OF THE  
CITY OF ST. LOUIS v. TITLE GUARANTY  
TRUST COMPANY, Appellant.

Division Two, July 25, 1914.

1. **TAXATION: Equity in Hypothecated Notes.** The Lincoln Trust Company of St. Louis, owning \$549,385.56 worth of notes secured by real estate, placed them with the Union Trust Company, as trustee, to secure the payment of \$500,000 first mortgage gold bonds issued by said Lincoln Trust Company. Then said Lincoln Trust Company sold its equity in the notes to defendant for \$49,385.56, just the difference between the amount of the notes and the amount of the bonds they were deposited to secure. *Held*, that defendant was taxable upon \$49,385.56, the value of its equity, and not upon the full value of the notes.
2. ———: **Board of Equalization: Supreme Court: Going Behind Records to Strike off Property Wrongly Added.** In a suit for personal taxes the Supreme Court on appeal is not bound by the records of the board of equalization, but may go behind them to strike off property not legally taxable against defendant, which, so far as the records show, was added to the assessment under the guise of increased valuation.
3. ———: **Board of Equalization in City of St. Louis: Power to Add Omitted Property.** By the Act of 1903 (R. S. 1909, sec. 11407), county boards of equalization were given the power to add omitted property to the assessment, and accordingly, by virtue of Sec. 3, p. 2562, R. S. 1899, which provides that all laws requiring a county officer to perform any duty

## State ex rel. v. Trust Co.

shall include the corresponding officer of the city of St. Louis, the St. Louis board of equalization has like power to add omitted property.

4. ———: ———: Notice to Property Owner: Defects Waived by Appearance. Although the notice to a property owner from a board of equalization failed to state, in accordance with Sec. 11407, R. S. 1909, the kind, class, and value of property about to be added to his assessment, but set out rather that the board proposed to increase his assessment, nevertheless any defects in the notice were waived by appearance.
5. ———: ———: ———: No Showing of Class to which Property is Added. The fact that the records of the board of equalization of St. Louis do not show the class to which omitted property was added does not invalidate the action of the board.

Appeal from St. Louis City Circuit Court.—*Hon.*  
*J. Hugo Grimm*, Judge.

REVERSED AND REMANDED (*with directions*).

*Wilfley, Wilfley, McIntyre & Nardin* for appellant.

(1) The debenture bonds, to secure which the notes in question in this case are deposited, are issued under express authority of the statutes defining the power of trust companies. R. S. 1909, sec. 1124. (2) Statutes imposing taxes are strictly construed against the State and in favor of the taxpayer. 37 Cyc. 768; State ex rel. v. Alt, 224 Mo. 513. (3) A general statutory provision that all property in the State shall be subject to taxation does not authorize the imposition of a tax on specific property where to impose such tax on such property would involve double taxation. Cooley on Taxation (3 Ed.), p. 398; State v. Railroad, 37 Mo. 268; State ex rel. v. Lesser, 237 Mo. 310; State ex rel. v. Brinkop, 238 Mo. 298; State ex rel. v. Railroad, 196 Mo. 535; East Livermore v. Trust & Banking Co., 69 Atl. (Me.) 306; Security Co. v. Hartford,

61 Conn. 89; *Tennessee v. Whitworth*, 117 U. S. 136; *Iron Factory Co. v. Danvers*, 10 Mass. 514. (4) The Board of Equalization of the city of St. Louis has no power to add to a tax return property which was not included in the return: Charter, art. 5, sec. 24; Revised Code, City of St. Louis (1907), sec. 2099; *Railroad v. Cass County*, 53 Mo. 17; *State ex rel. v. Cunningham*, 153 Mo. 642; *State ex rel. v. Baker*, 170 Mo. 283; *State ex rel. v. Alt*, 224 Mo. 513. (5) No tax can be collected unless founded on a valid assessment; and that the assessment on which a taxbill is based was not properly made may be shown in defense to a suit on the taxbill. *State ex rel. v. County Court*, 13 Mo. App. 54; *State ex rel. v. Cunningham*, 153 Mo. 642; *State ex rel. v. Lesser*, 237 Mo. 310.

*Edward W. Foristel* and *Frank H. Haskins* for respondent.

(1) The notes secured by mortgage owned by appellant were subject to taxation. R. S. 1909, sec. 11348; *Russell v. Croy*, 164 Mo. 69. (2) The board of equalization had authority to add property to the return made by appellant. Charter, art. 5, secs. 15, 24; R. S. 1909, secs. 11354, 11407, 11521; *State ex rel. v. Baker*, 170 Mo. 383; *State ex rel. v. Alt*, 224 Mo. 509. (3) Appearance before the board is a waiver of defect in notice or proceedings. *State ex rel. v. Baker*, 170 Mo. 383. (4) The fact that the board added to the return property knowingly omitted is a conclusive presumption that they found the omission was made with fraudulent intent. *State ex rel. v. Baker*, 170 Mo. 383. (5) Increasing the amount of class 8 is not adding new property but is a re-valuation of property previously listed. *Donch v. Board*, 4 Ind. App. 374. (6) Even if an assessment is improperly raised it will not prevent judgment for the amount actually due. *State ex rel. v. Vaile*, 122 Mo. 47.

## State ex rel. v. Trust Co.

ROY, C.—This is a suit for personal taxes in which judgment went for the plaintiff.

At the assessment of June 1, 1910, the defendant returned to the assessor an assessment list or "tax return" showing the following items:

Class	Articles	Value	Total Value by Classes
Fifth.	Money on hand .....	\$ 12,735.71	
Sixth.	Money deposited in bank or other safe place .....	173,620.31	\$185,356.02
Eighth.	Aggregate statement of all solvent notes secured by mortgage or deed of trust .....	93,597.34	
Ninth.	Aggregate statement of all solvent bonds, whether state, county, town, city, township, incorpor- ated or unincorporated com- panies .....	51,100.00	144,697.34
Tenth.	Title plant .....	350,000.00	350,000.00
Subject to state, school and city tax.....			\$680,060.00

On April 1, 1911, the following entry was made on the record of the board of equalization:

"On motion, the board proposed to increase the assessment of the following"—then enumerates a number of different names, among which is included "the Title Guaranty Trust Company, \$680,060 proposed to increase to \$2,500,000."

The records of the board read in evidence show that Messrs. Rohan, Allen and Gottlieb appeared before the board in behalf of the defendant on April 5, 1911, and furnished to the board evidence on the question of defendant's taxable property. On April 8, following, a committee representing defendant again appeared before the board. On April 15, 1911, the following entry was made in the records of the board:

"On motion, the board increased the personal assessment of the Title Guaranty Trust Company from \$680,060 to \$861,000."

No notice of the action of the board taken on April 15, 1911, was given to defendant.

The evidence before the board of equalization and on the trial showed that the item of \$93,597.34 was the face value of the solvent notes held by the defendant, secured by real estate, and which had not been pledged for the payment of bonds. Such evidence also showed that the Lincoln Trust Company had owned notes secured on real estate to the amount of \$549,385.56, which it had placed in the Union Trust Company of St. Louis as trustee to secure the payment of \$500,000 of first mortgage gold bonds issued by the Lincoln Trust Company. The latter company by an agreement in writing conveyed to the defendant its equity in the notes so deposited with the Union Trust Company, in consideration of the payment by the defendant to the Lincoln Trust Company of the amount of \$49,385.56, just the difference between the amount of the notes and the amount of bonds they were deposited to secure. The board, after hearing the evidence, added to the total of the original assessment list as returned by the defendant the full amount of the hypothecated notes, making \$680,060.00 + \$549,385.56 = \$1,229,445.56. The board then estimated the total value at seventy per cent of the latter sum and fixed its total assessment in round numbers at \$861,000, a net increase of \$180,940 of the total assessment.

The total rate of taxation for all purposes is \$2.22 on the \$100 of valuation.

I. The Lincoln Trust Company acted under the provisions of the eighth clause of section 1124, Revised Statutes 1909, when it placed the \$549,385.56 in notes in the Union Trust Company to secure the bonds issued by the Lincoln Trust Company. Appellant truly says that the bonds thus

**Taxation:**  
**Equity in**  
**Hypothecated**  
**Notes.**

issued were not exempted by that or any other law from taxation. It further says that to tax both the bonds and the notes would be double taxation. We think not. There is no law which enables a taxpayer to deduct the amount of his debts from the amount of his taxable property. When a taxpayer holds a solvent note and places it as collateral to secure a note made to another party by him, he is subject to taxation on the full value of such collateral note, because the law taxes his property ignoring his debts. The Lincoln Trust Company was taxable with the full value of the pledged notes, it having no power to deduct the bonds which it had sold against those notes.

But the defendant does not stand in the shoes of the Lincoln Trust Company. The latter company did not sell to the defendant the entire interest in the notes. It sold only the equity in them, amounting to \$49,385.56. As between all the parties concerned in the notes or bonds, the defendant owns only the equity in those notes, while \$500,000 of their value must be applied to the payment of the bonds. So far as the facts appear, defendant did not buy the notes and assume to pay the bonds. It bought the equity, leaving the bonds to be taken care of, so far as personal obligation is concerned, by the Lincoln Trust Company, and so far as security is concerned by the lien on the notes. Did the defendant, by buying an interest (equity) in the notes valued at \$49,385.56, become at once subject to assessment for \$549,385.56? Surely, one who owns some small interest in a horse, a promissory note, a stock of goods, or other personal property, is not subject to taxation for its full value. He is to be taxed only on his interest in the property, whatever that interest may be.

II. The records of the board show merely an increase in the valuation of the property already as-

sessed. At least that is the effect of the entry. But the *fact* is that the board added to the list what it adjudged to be omitted property, and then reduced the total amount by thirty per cent. It is our duty to go beyond the surface of things and to discover what the real facts

Records of  
St. Louis  
Board of  
Equalization:  
Suit for  
Personal Taxes:  
Going Behind  
Board's Record.

were. This is not a proceeding by *certiorari*, where the court must take the record of the board as conclusive, as in *State ex rel. v. Baker*, 170 Mo. l. c. 203.

In *State ex rel. v. Cunningham*, 153 Mo. 642, it was held that the board had no right to add other property to the list under the disguise of "increased valuation." In that case it was held that the board had no power to add other property to the list. The law on that question has since been changed (*State ex rel. v. Baker*, 170 Mo. 383); but we still say that the board cannot add to the list under such disguise property which is not legally taxable against the defendant.

III. In *State ex rel. v. Lesser*, 237 Mo. 310, the taxpayer had in *due form of law*, been assessed with stock in a foreign corporation. In a suit against him to collect the tax, based on such assessment, this court held that such stock was not legally subject to assessment against him. In that case the property assessed against the taxpayer was *owned* by him, but not subject to assessment.

In this case the \$500,000 in the notes was not owned by the defendant. Surely the court has the same power to furnish relief in this case as in the other.

IV. Section 3 of article 25 of the "Laws specially applicable to the city of St. Louis," as it appears on page 2562, Revised Statutes 1899, provides that: "All laws requiring any officer of any county to perform any

Power to  
Add Omitted  
Property.

duty, service or trust, under the laws of this State, shall include all corresponding city officers named in the charter and scheme of separation for the government of the city and county of St. Louis."

Many sections of those laws specially applicable to St. Louis have been published in the revision of 1909 in various different subdivisions of that revision. Section 3 above referred to does not appear in that revision, so far as we have been able to discover, but it is still the law, because it has never been repealed. It appears as section 408, on page 159 of Rombauer's Revised Code of St. Louis.

Prior to 1903 neither the county boards of equalization under section 1104, Revised Statutes 1909, nor the board of equalization of St. Louis under section 24 of article 5 of the city charter, had power to add omitted property to the assessment. By the Act of 1903, now section 11407, the county board was given such power. Every reason which prompted the giving of such power to the county boards applies to the city board. In our opinion the section above referred to extends the application of the amendment to the city board of equalization, and gives it power to assess omitted property

V. Said section 11407 provides that when the board shall add any property to the books, it shall

Notice to Property Owner.	serve notice on the owner, stating the kind and class of property, and the value, and stating the time and place when the owner may be heard.
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It must be conceded that the notice in this case did not state that any property had been added to the books. The language of the notice very clearly indicates that it was given in accordance with section 24 of article 5 of the charter above mentioned, which



only contemplated an increase in the assessment of property already on the books.

Cooley on Taxation (3 Ed.), vol. 1, p. 783, says: "Yet by appearing before the board he waives all objections to the absence or insufficiency of notice." It was so held in *State ex rel. v. Baker*, 170 Mo. l. c. 390.

VI. The fact that the record of the board did not show the special class of property to which the omitted property was added does not invalidate the action of the board. Had the record entry shown that the omitted property was added to the list of solvent notes secured by deeds of trust, it would not have made the result in any way different, so far as the defendant is concerned. The form of the entry was merely an irregularity not affecting the rights of the defendant.

We pass no opinion on the process by which the board added the full amount of the notes which were placed as such security and then fixed the assessment at seventy per cent of the total amount. We do find the fact to be that the interest of the defendant in the pledged notes, i. e., \$49,385.56, was properly charged in the assessment against the defendant; and that said assessment as fixed by the board was valid to the extent of the original assessment increased by \$49,385.56, amounting to \$729,445.56. The rate of taxation being \$2.22 on each \$100 valuation, the principal of the tax legally due is \$16,193.69.

The judgment is reversed and the cause remanded with directions to enter judgment for the latter amount named as taxes, (and since by its appeal substantial relief has accrued to appellant,) with interest thereon at the rate of six per cent per annum from the date of the judgment heretofore entered in this cause by the circuit court of the city of St. Louis, together with all costs of suit. *Williams, C.*, concurs.

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Ostertag v. Railroad.

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PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. *Walker, P. J.*, and *Brown, J.*, concur; *Faris, J.*, concurs in result.

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LOUIS H. OSTERTAG v. UNION PACIFIC  
RAILROAD COMPANY, Appellant.

Division Two, July 25, 1914.

1. **NEGLIGENCE: Starting Engine Suddenly Without Warning:**  
**Evidence:** Question for Jury. Plaintiff, a switchman in defendant's employ, had ridden in the cab of a switch engine while it backed westward on track 5 in defendant's yards until it neared a switch connecting that track with track 4, parallel thereto on the north. There the engine stopped, hardly in the clear, while the foreman of the crew walked to a shanty south of the tracks and west of the switch, to report to the yardmaster. On track 4 stood a freight train headed west, with its engine near the switch. As this freight "whistled off," preparatory to pulling out westward, it was discovered that the switch engine was not in the clear, and accordingly the engineer moved it one or two car lengths east of the point of clearance. The freight conductor signaled his train to "come ahead" and it started. About that time plaintiff alighted from the cab of the switch engine and walked westward beside it on the south until he was five or ten feet beyond the tender, where he started to cross the track on his way to the shanty. Meantime the foreman signaled the switch engine to cross the switch ahead of the freight. The engine backed suddenly, and the tender struck the plaintiff just after he stepped upon the track. The engineer and fireman testified that the bell was rung as the engine started, but there was testimony to the contrary. *Held*, that the questions whether plaintiff in so attempting to cross the track failed to use ordinary care, and whether the switch engine was started without warning in such way and under such circumstances as to constitute negligence on defendant's part, were for the jury.
2. ———: ———: ———: **Of Company's Rule: Point not Presented in Instructions.** Where, in an action for injuries to a switchman run down by an engine behind which he attempted to pass, defendant's evidence was that switch engines in the yard were not required to answer signals with the

whistle, and testimony was admitted that defendant had a rule requiring two short blasts of the whistle in answer to any signal not otherwise provided for, error, if any, in the admission of the rule was harmless, since the instructions did not submit any fact involving that rule.

3. **ARGUMENT OF COUNSEL: Calling Claim Agent a Ghoul.** There was no error in plaintiff's counsel in his argument calling defendant's claim agent a ghoul, when speaking of his having visited the hospital and obtained a statement from plaintiff two days after the accident in which plaintiff had lost a leg.
4. ———: **Improper: Considered in Reducing Verdict.** While the improper argument of plaintiff's counsel is not reversible error in this case, it is taken into consideration in deciding whether or not the verdict is excessive.
5. **NEGLIGENCE: Excessive Verdict.** Where plaintiff, 34 years old and in good health, earning \$100 a month as a switchman in defendant's employ, lost his leg by reason of the negligence of defendant's servants, a verdict of \$15,000 is held to be excessive by \$5000, especially in view of the fact that plaintiff's counsel used improper argument to the jury.

Appeal from Jackson Circuit Court.—*Hon. C. A. Lucas*, Judge.

**AFFIRMED** (*conditionally*).

*R. W. Blair and Watson, Watson & Alford* for appellant.

(1) Under the pleadings and evidence the plaintiff was not entitled to recover, and the court should have instructed the jury to return a verdict for defendant. *Loring v. Railroad*, 128 Mo. 349; *Clancy v. Railroad*, 93 Mo. 433; *Evans v. Railroad*, 178 Mo. 517; *McGrath v. Railroad*, 195 Mo. 94; *Cahill v. Railroad*, 205 Mo. 393; *Brockschmidt v. Railroad*, 205 Mo. 444; *Degonia v. Railroad*, 224 Mo. 590; *Rashal v. Railroad*, 155 S. W. 429; *Gabal v. Railroad*, 158 S. W. 16; *Aerkfetz v. Humphries*, 145 U. S. 418; *Elliott v. Railroad*, 150 U. S. 245; *Railroad v. Skiles*, 68 Ohio St. 458; *Riccio v. Railroad*, 189 Mass. 358. (2) Plain-

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tiff's counsel were guilty of misconduct which should reverse this case. *Haake v. Milling Co.*, 153 S. W. 74; *Field v. Railroad*, 137 Fed. 14. (3) The verdict is excessive. The injury did not deprive respondent of his ability to do other business and six per cent on \$15,000 is \$900 a year and it appeared in evidence he had fitted and wore a wooden leg which enabled him to get around without crutches. Hence he was not wholly but only partially disabled from performing labor and could perform many different kinds of labor with fair remuneration.

*Guthrie, Gamble & Street* for respondent.

(1) Defendant was guilty of actionable primary negligence. *Tetwiler v. Railroad*, 242 Mo. 187; *Penney v. Stock Yards Co.*, 212 Mo. 309; *Johnson v. Railroad*, 203 Mo. 400. The signal of Moore to start the engine was negligence. Seeing the plaintiff, he should have seen that the plaintiff was in the pathway of the engine. It being negligence as to the employees of train 157 to start engine 1241, the injury to plaintiff was actionable on account thereof, although not directly anticipable therefrom. *Hoepper v. Hotel Co.*, 142 Mo. 388; *Graney v. Railroad*, 140 Mo. 98; *Meade v. Railroad*, 68 Mo. App. 101; *Smith v. Railroad*, L. R. 6 C. P. 20; *Dixon v. Scott*, 181 Ill. 116; 21 Am. and Eng. Ency. Law (2 Ed.), p. 488. (2) The plaintiff was entitled to protection as an employee. *Ellsworth v. Metheney*, 104 Fed. 119; *Mining Co. v. Schmidt*, 104 Fed. 282; *Hammil v. Railroad*, 93 Ky. 343; *Schumacher v. Breweries Co.*, 247 Mo. 153; *Tetwiler v. Railroad*, 242 Mo. 178; *Read v. Railroad*, 94 Mo. App. 377; *Brick Co. v. Fisher*, 79 Kan. 576; *Sugar Co. v. Riley*, 50 Kan. 401; *Zinc Co. v. Martin*, 93 Va. 491; *Wallace v. Oil Co.*, 66 Fed. 260; *Blovelt v. Sawyer*, L. R. 1 K. B. D. (1904) 271; *Muller v. Mfg. Co.*, 99 N. Y. Supp. 923; *Muhlens v. Obermeyr*, 82 N. Y.

Supp. 527; *Adams v. Wire Co.*, 78 Mich. 271; *Taylor v. Bush & Sons Co.*, 6 Pa. 306; *Willmarth v. Cardoza*, 176 Fed. 1; *Railroad v. Oldridge*, 33 Tex. Civ. App. 439; *Helmke v. Thilmany*, 107 Wis. 221; *Walbert v. Trexler*, 156 Pa. St. 112; *Boyle v. Fire-Proofing Co.*, 182 Mass. 93; *Ewald v. Railroad*, 70 Wis. 420; *Brydon v. Stewart*, 2 Macq. (H. L. Cs.) 20; 33 Eng. L. and E. Rep. 1. (3) The question of plaintiff's contributory negligence was for the jury. Contributory negligence is for the jury where there may be an honest difference as to inference of ordinary prudence. *Cooley on Torts*, p. 802; *Powers v. Railroad*, 244 Mo. 1; *Francis v. Railroad*, 127 Mo. 669; *Shrank v. Railroad*, 159 Mo. App. 299; *Bender v. Weber*, 138 Mo. App. 544; *Day v. Dry Goods Co.*, 114 Mo. App. 484. It is not necessarily negligence to rely upon signals being given before stationary cars or engines are started. *Tetwiler v. Railroad*, 242 Mo. 178; *Penney v. Stock Yards Co.*, 212 Mo. 309; *Black v. Railroad*, 172 Mo. 177; *Johnson v. Railroad*, 160 Mo. App. 77; *Heine v. Railroad*, 144 Mo. App. 443; *Dunwoody v. Railroad*, 136 Mo. App. 515; *Wilkins v. Railroad*, 101 Mo. 105; *Gurley v. Railroad*, 104 Mo. 212; *Railroad v. Cane*, 90 S. W. (Ky.) 1061; *Railroad v. Key*, 150 Ala. 641; *Welch v. Railroad*, 176 Mass. 399; *Griffin v. Railroad*, 148 Mass. 148. Employees are not necessarily negligent in depending upon the observance of usual practices and signals. Although it is ordinarily contributory negligence as a matter of law to step in front of moving cars and engines without looking or listening, even under that strict and universal rule, it becomes a question for the jury when there are circumstances tending to confuse or mislead the plaintiff, or lull his senses into a sense of security. (a) As where plaintiff relies upon the observance of ordinance speeds. *Rissler v. Transit Co.*, 113 Mo. App. 124; *Hutchinson v. Railroad*, 161 Mo. 246, 3 Syl.; *Strauchon v. Met. St. Ry.*, 232 Mo. 587, 5 Syl. (b) Or an

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expectation that one train will not approach the junction until another has cleared it. *Burbridge v. Cable Co.*, 36 Mo. App. 670, 7 Syl. (c) Or relies upon approaching trains making customary stops. *Percell v. Railroad*, 126 Mo. App. 51. (d) Or relies upon customary audible signals being given at specific points. *Johnson v. Railroad*, 203 Mo. 400. (e) Or relies upon raised crossing gates indicating safe passage. *O'Keefe v. Railroad*, 108 Mo. App. 184; *Palmer v. Railroad*, 112 N. Y. 236; *Hoelgin v. Railroad*, 143 N. C. 96; *Roberts v. Railroad*, 177 Pa. St. 183; *Messenger v. Railroad*, 64 Atl. 682; *Railroad v. Shulz*, 183 Fed. 673; *Railroad v. Larnard*, 161 Fed. 520. (f) Or relies upon the absence of a watchman who is customarily present when trains are passing. *Montgomery v. Railroad*, 181 Mo. 500; *Railroad v. Amos*, 54 Ark. 164; *Dolph v. Railroad*, 74 Conn. 538, 1 Syl.; *Railroad v. Yundt*, 78 Ind. 373; *Railroad v. Stegenmeier*, 108 Ind. 309; *Richmond v. Railroad*, 87 Mich. 374; *Woehrle v. Railroad*, 82 Minn. 169; *Railroad v. Schneider*, 45 Ohio St. 678; *Jones v. Rolling Mill Co.*, 65 Wis. 315. (g) Or relies upon the silence of an automatic electric crossing bell. *Tobias v. Railroad*, 110 Mich. 440; *Kimball v. Friend*, 95 Va. 138. (4) No improper evidence was admitted under the facts. (5) The verdict was not excessive. *Yost v. Railroad*, 245 Mo. 252. (6) There was no misconduct of counsel. The remarks of counsel were justified by the record. *State v. Allen*, 144 Mo. App. 242; *Partello v. Railroad*, 240 Mo. 139; *State v. Miles*, 199 Mo. 553. The question was one for the sound discretion of the trial court, with its better knowledge of the case as a whole. *Huckshold v. Railroad*, 90 Mo. 559; *Gidionsen v. Union Depot Ry. Co.*, 129 Mo. 402; *Wendler v. House Furn. Co.*, 165 Mo. 542; *Malin v. Ins. Co.*, 105 Mo. App. 643. The proper method for correction of misconduct, if any, is by proper rebuke at the time. *State v. Taylor*, 134 Mo. 158. Even if there be misconduct,

it is incumbent upon the party complaining to point out specifically his objection to the alleged misconduct, and ask a proper rebuke or instruction to the jury. A mere objection is not sufficient. If the objecting party fails to ask for a rebuke or an instruction, or the court fails to sufficiently rebuke or instruct the jury, the objecting party is deemed to have been satisfied and waived complaint in the absence of a final exception to the action or non-action of the court. *Dutcher v. Railroad*, 241 Mo. 177; *Rose v. McCook*, 70 Mo. App. 189; *Payne v. Railroad*, 129 Mo. 404; *State v. Gartrell*, 171 Mo. 512; *Estes v. Railroad*, 111 Mo. App. 4; *Peck v. Traction Co.*, 131 Mo. App. 142; *State v. Chenault*, 212 Mo. 137; *Yost v. Railroad*, 245 Mo. 151.

ROY, C.—This is a suit for damages for personal injuries. The plaintiff recovered a verdict and judgment for \$15,000.

He was thirty-four years old at the time of the injury, and in good health. He had been in the employ of defendant as a switchman about four years, and had been in railroad work longer. The injury occurred in defendant's freight yards in Kansas City, June 7, 1910, about 6:40 p. m. Plaintiff was one of the crew of engine No. 1241.

The petition alleges the negligence as follows:

“That while such switch engine was stationary and plaintiff was engaged in the act of passing around the end of the same, and in a position of peril from the movement of said engine backward, the said switch engine, in consequence of and through the negligence and mismanagement of the agents, engineers and other employees of the defendant, including the foreman of said switching crew, was suddenly, swiftly and violently moved backward, toward and against the plaintiff; and said agents, engineers and other employees, including the foreman of said switching crew, negli-

gently failed to give any warning to the plaintiff, as due care required them to do, of such movement of such engine."

It alleges the loss of his left leg about half way between the knee and hip, and that he was earning one hundred dollars a month, and prays for \$25,000 damages.

The answer contained a general denial, a plea of contributory negligence and an allegation that under the law of Kansas the plaintiff assumed the risk. The reply is a general denial.

Tracks four and five in the defendant's yards running parallel from east to west are connected at the west by a switch, from which the track continues west. On the south side of the track and two or three hundred feet west of that switch was the "shanty" or office where the defendant's employees went to get and give orders and reports. Freight train No. 157, containing about fifty cars, was on track four. The road engine was coupled to the west end of that train and headed west. In front of the road engine was coupled the helper engine reversed, i. e., with its head to the east. It was there for the purpose of helping the train start westward on an upgrade. South of that train was engine 1241 on track five. It was coupled to its tank or tender, but not to any cars. The plaintiff was in the cab of his engine at the time it arrived near the switch. The foreman of that engine, Mr. Moore, had come with the engine from the east, riding on the footboard on the rear end of the tank, which was in advance as the engine backed west. On reaching that spot, the foreman left the engine and went to the shanty to report to the yardmaster, Shull, and to receive additional orders if there were any. It was quitting time for that engine and crew, and, in the absence of further orders, the engine was to be taken westward beyond the shanty to the roundhouse, and the crew were to disperse to their homes. As



Moore reached the shanty, he met and passed Detwiler, conductor of the freight who was going towards his train. About that time No. 157 "whistled off," i. e., signaled that it was ready to go. Engine 1241 was too near the switch to permit the freight to pass safely. It headed east so that the freight could pass, and stopped with the west end of its tank one or two car lengths east of the clearing point of tracks four and five. The west end of the helper engine in front of the freight train was about the same distance east of the clearing point. Detwiler, the freight conductor, signaled his train to "come ahead" and it started. About that time the plaintiff, having left the cab of his engine about the time it last stopped, passed west between tracks four and five on his way to the shanty, and Moore, the foreman of 1241, with the permission of Shull, the night yardmaster, signaled his engine to "back up," which meant to come on west over the switch ahead of 157. The engine started quickly and the rear end of the tank, which was for the time in front, struck plaintiff within five or ten feet after starting. The plaintiff had stepped on track five on his way to the shanty.

Melvin H. Milam, fireman on the "helper" engine, witness for plaintiff, testified as follows:

"Q. Suppose you tell us in your own way what happened there that night with reference to the switches and the engines on 157 and this engine 1241. A. Well, 157 was made up on track 4. 1241 had made a Frisco transfer and backed out the stock track and onto 5 and come up about even with the switch engine on the head end of 57. They stood there quite a little bit—I don't know how long—and the conductor—we got the switch anyway and the conductor gave us a highball. When they pulled up there they pulled up too far and they had to back down again to get in the clear.

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"Q. That is 1241? A. 1241. Then they gave us the switch and the conductor gave us a highball and we whistled off and started up. Just as we started somebody gave a sign for 1241 to back up towards the west and beat us to the switch. Then is when Ostertag got hit.

"Q. How far did you say that 1241 moved when it headed east to clear 4? A. The length of the engine.

"Q. You say you got the switch. Did your train whistle for the switch to get it? A. No. They gave us the switch and we whistled off.

"Q. Where was 1241 at the time you started? A. They were about even with the switch engine of 57.

"Q. That is, with your engine? A. Yes, sir.

"Q. How long was it after you started before 1241 started west? A. Well, I could not say.

"Q. As your engine stood there alongside of 1241, how far was your tank, the end of your tank, from the clearing point between tracks four and five? A. Well, if I remember right about the length of the engine. Probably a few feet further.

"Q. How far would you say you moved with the helper engine from the time you started to the west until you stopped? A. Ten or twelve feet, something like that, maybe not that far. All I remember is we got started, whistled off and got started,"

Plaintiff took the deposition of W. H. Wildermood, engineer of engine 1241, and the defendant read it in evidence. He testified:

"Q. Mr. Wildermood, suppose you tell us in your own way what occurred there in the operation of that engine from the time you first backed west toward the switch shanty the evening Ostertag was hurt. A. Well, we backed up on what we call No. 5 and engine 1151, night engine, was switching on the hill, and we couldn't get out so I stopped where I supposed it

would clear 4. Well, night engine 1151 shoved in the clear.

"Q. That was onto track 3? -A. That was on track 4. We were on track 5. No. 157 that is a train of local merchandise, going west, whistled off. Fireman says to me, he says, 'Go ahead a little in the clear.' I says, 'I am in the clear,' and he says, 'Well, you don't clear good,' and Lou Ostertag dropped off the engine and says, 'Yes, give them a good clear.' So I let engine 1241 slack ahead in the clear about thirty or forty feet. I will say that much, but I don't know whether that far, and maybe a little farther. After I stopped the fireman says, 'Back up.' I says 'What?' The fireman says, 'Moore says back up,' and I looked over the tank and seen Moore, the foreman, give the signal to back up, and George Tighe lining the switch up for four. I started back, and I went back probably two engine lengths, maybe a little more, and the fireman hollered, and he says, 'Stop, we have run over Lou Ostertag,' and I stopped as quick as I could.

"Q. Where was the west end of this train 157, the tank of the helper engine on that train, with reference to the clearing point when you stopped before you headed east to clear? A. Well, I don't know. I didn't pay no attention.

"Q. How quick after you had headed down in the clear was it that the fireman told you to back up? A. Well, I don't know as I any more than stopped till the fireman says, 'Back up,' not much more anyway.

"Q. What made you say 'what?' in that surprised sort of way to the fireman? A. Well, because the fireman told me to slack ahead in the clear. 57 whistled off and I supposed they was going to let 57 go before us. Didn't think of the way it was done.

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"Q. Was that the way it had ordinarily been done? A. Yes, sir.

"Q. How fast did you get going before you had run over Ostertag? A. Well, I don't know. I could not say.

"Q. Give your best judgment? A. That would be a hard matter to do.

"Q. Can't you give us some idea? A. No, sir. Don't believe I could.

"Q. Did you know that—I believe you said you did know that 157 had started. A. Yes, sir. They whistled off and was supposed to start. I heard them working steam.

"Q. After you said 'What?' and the fireman said that Moore was signaling to back up and you looked and saw Moore signaling to back up and Tighe throwing the switch, did you understand that you were to cross that switch before 157 could get to it? A. I understood that's what they meant for me to do.

"Q. Did that require you to act promptly and quickly? A. Well, yes, it did, to a certain extent.

"Q. How wide open did you open the throttle? A. Well, I could not say about that.

"Q. Did you try to make a quick run for that switch? A. Ordinarily. If it hadn't looked safe I wouldn't have started.

"Q. How long after Ostertag got off the engine before you started back? A. Well, it didn't seem to me more than a minute. It might have been a little longer and it might have been not any more.

"Q. How far did you run altogether on that last movement? A. Well, in my judgment I didn't run over three engine lengths from the time I started till I stopped.

"Q. What is about the length of the engine? A. Of that engine? I suppose it was about probably maybe between forty and fifty feet, the engine and

tank. When we speak about the engine we mean the tank and all.

“Q. That’s what I mean. Where was Ostertag after you stopped? A. Ostertag was at the front end of the engine.”

He testified that the fireman pulled the bell when he started to back up.

E. C. Allison, fireman of 1241, testified that he did not ring the bell before they started but just as they started.

All witnesses except the above two and the plaintiff testified that they could not say whether the bell was rung.

Plaintiff testified: “Well, we had been down to the freight house and set a freezer on 5½, and we came back up No. 5, backing up, understand, working that engine 1241, when they were getting up towards the head end of this 57, she made up on 4 alongside of us, and while we was heading up towards the head end of this train, she had whistled off, we had run up on the frog and stopped, I was up in the cab all this time, got in the cab when we were leaving the freight house platform, cut the car off and put a block under it so it would not run off, climbed up in the cab and rode up standing up there with the engineer and fireman. Well, this train had whistled off when we ran up on this frog, and somebody told us to get in the clear, I couldn’t say who it was, but I heard somebody say, ‘Get in the clear;’ the engine ran in the clear, ran down probably opposite the road engine, at that time she was starting to move, you know, so just as he stopped in the clear I got down on the left side of the gangway, got out of the cab, you know, the back of the cab, got down on the left side, I walked back between this moving train, and our engine was standing still here, on the left side of me, this train was pulling out along on the north side, on my right, and I was heading west; just after I was walking along

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here, the side of our tank, I was watching this train, too, you know, she was under motion, this engine of ours was standing still, I got to the back of the tank of our engine, I stepped across with this foot over the north rail, cut diagonally across, going up to the shanty, customary to go up there, you know, when the engine is idle, and the foreman was up there—yes, he was up there, so just as I stepped behind the tank this way, about to cross this way, the engine hit me in the back, knocked me down, and that is all I know.

“Q. Was engine 1241 stationary at the time you passed behind it, when you first stepped in behind it on the track? A. Yes, sir; that engine was standing still, after I stepped over the rails to cross it, she was still standing, but she moved immediately after I started across.

“Q. How far would you judge you had got away from the engine, from where the engine was, when it stopped still, and you turned around the corner of the tank when it hit you. A. How far was I from the back of the tank?

“Q. Yes, sir; how far do you say it had moved? A. Well, maybe it might have been from here to that gentleman, the second man here, I don't know, I just stepped over and across, out, you know.

“Q. Well, give your best judgment of it in feet? A. Well, I should say five—not more than ten feet, anyhow.

“Q. You may state whether or not any whistle was blown or bell rung? A. No, sir; God knows!

“Q. What injuries did you receive there at the time, Mr. Ostertag? A. Well, I lost this limb five inches and a half from the hip joint; bruised this eye here, this left eye; this right hip was bruised clear down to the ankle and back, it is skinned; the watch here ran into my side; there is the dent in it yet. I

carried that watch right here, it ran this watch-stem into my side, and part of the chain I had on it."

"Q. You feel that foot, you mean the foot that is gone? A. Yes, sir, feel the natural leg, the toes down here, it hurts sometimes, feels like a great wheel standing on the toes, or something.

"Q. Now, how does the limb bother you now, in what way? A. Well, from walking around, you know, it gets sore and I can't stoop over, you see, I can't bend, I have to stand stiff like, if I want to stoop over, you know, it sets right up in the crutch, you know, it is hard on me in the summer time, especially hot weather.

"Q. What difference does the summer time make? A. The heat, you know, and perspiration, sweat a good deal, kind of chafes it, and it takes a long time, you know, to get a stump healed up, to get it good and solid and get used to it.

"Q. Then you may answer directly the question whether or not that limb has ever been free from pain since this accident? A. No, sir."

He testified that the engines were operated on signals, that he was familiar with the rules of the company and with the signals, that the employees were supposed to look out for the signals, that the switch engines have no schedule time, and that there is danger from their moving back and forth. He also testified that he did not see the signal given to 1241 to back up, that he was not looking for it, but was looking where he was going.

C. A. Moore, a witness for defendant, testified as follows:

"Q. Now, what conversation, if any, did you have with Mr. Shull up there in regard to the movements of your train and movements of 157? A. Why, I asked him if we had time to go out ahead of 157, or something to that effect, or I remarked to him that

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we had time to go ahead of them, and he said yes, we had.

"Q. Had you seen at that time Mr. Detwiler—where was he at that time, do you remember, did you see him? A. He came out of the office as Mr. Shull and I were talking, with his bills in his hand, and when I got through telling Mr. Shull about this, about the time I made the remark I says, 'Is 157 ready to go?' He says, 'Yes, just about.' 'Well,' I says, 'we can get out ahead of them.' He says, 'Yes, come ahead;' so I just turned and gave my man a sign to back up.

"Q. Now just state to the jury whether you could tell from where you were at that time, you could tell, now, where Mr. Ostertag was at that time, if you know? A. No, I could not tell just exactly where he was at; he was near the tender of the engine.

"Q. And was the engine standing still at that time? A. When I gave my back-up signal?

"Q. Yes. A. Yes, sir."

Two days after the injury, Mr. Taylor, representing the defendant, called to see plaintiff at the hospital and plaintiff signed a statement at Mr. Taylor's request, stating among other things that plaintiff could not say whether the bell was ringing when he was struck, as there was so much noise. Plaintiff was at that time under the influence more or less of an opiate. That statement was read in evidence by the defendant. The plaintiff read in evidence over the objection of defendant a rule of defendant providing for two short whistles in answer to any signal not otherwise provided for. During plaintiff's examination in chief the following occurred:

"Q. You may state whether there was any custom in that yard at that time and previous to that time, I mean the time of your injury, as to any signal other than the bell from the engineer when he gets a signal to start to work again after being laid off or



ties up for any time, is there or is there not or was there or was there not such a custom? A. Yes, sir.

"Defendant's counsel objected as incompetent, irrelevant and immaterial, because not pleaded, and asking for the conclusion of the witness, and asking him to pass upon what is the custom, assuming facts not proven. The court overruled the objection. To which ruling of the court defendant then and there duly excepted.

"Q. What was the custom, Mr. Ostertag?

"Defendant's counsel objected to the question for the reason that the witness is not shown competent, not shown there was any custom, and not within the issues of the pleadings. The court overruled the objection. To which ruling of the court defendant then and there duly excepted.

"Q. What was the custom? A. Well, if the engine was standing there, and we all had been up to the shanty, say, for instance, we come down with that engine, and the foreman or I, or anybody would give them a signal, he did acknowledge the signal by giving two short blasts of the whistle—choo, choo, answer he got your signal, lots of times.

"Q. Was it customary all the time?

"Defendant moved to strike out the preceding answer for the same reasons last above stated, it being a mere conclusion of the witness. The court overruled the motion to strike out. To which ruling of the court defendant then and there duly excepted.

"A. And other days when they all go to work he will acknowledge the foreman's signal and mine, if I give any, two short blasts of the whistle.

"Defendant's counsel moved to strike all that out for the reasons last above stated. The court overruled the motion. To which ruling of the court defendant then and there duly excepted."

The plaintiff pleaded and proved a statute of Kansas providing that a servant may recover against

the master for the negligence of a fellow servant upon the giving of a notice not necessary here to be stated.

Defendant read in evidence a statute of Kansas adopting the common law as modified by the constitution, statutes, decisions of the courts, etc., also the case of Dyerson v. Railroad, as reported in 74 Kansas Reports, page 528. Defendant read in evidence a rule of the company providing that "all employees are further warned that they must not rely on others to notify them of the approach of a train." The defendant's witness Moore testified that it was not customary for switch engines to answer signals with the whistle.

Among the instructions the court gave the jury the following for the plaintiff:

"A. If from the evidence you find that on or about the 7th day of June, 1910, while plaintiff was in defendant's employ as a member of a switching crew in charge of and operating a switch engine of the defendant in the course of its business, he was, without negligence upon his part, struck and injured by said switch engine, and that he was so struck by reason of the negligence, if any, of any of defendant's servants in charge of such engine or in control of its movements in causing such engine to move backward against the plaintiff suddenly and without warning, your verdict should be for the plaintiff. By 'negligence' as used above is meant the want of such care as persons of ordinary prudence should be expected to use under the same or similar circumstances."

And the following for the defendant:

"1. The court instructs the jury that it was not negligence of itself for defendant to move engine 1241 over track 5, passing the switch connecting track 4 and track 5, ahead of train 157, at the time and place described in evidence and you cannot find for plaintiff on that issue.

"2. The court instructs the jury that it was not negligence of itself for foreman Moore to give a signal to engine 1241 to come ahead of train 157 at the time and place mentioned in evidence and you cannot find for plaintiff on that issue.

"3. The court instructs the jury that there is no evidence in this case showing that the agents and servants of defendant saw plaintiff in a situation of peril after he stepped onto the track in front of switch engine 1241, in time to have stopped said engine after it was started and avoided injuring the plaintiff and you will therefore find for defendant on that issue."

And refused to give other instructions asked by defendant, among which are the following:

"4. The court instructs you that under the law of Kansas, read in evidence, it was not negligence for defendant's employees to move said engine over track 5, ahead of train 157 on track 4 as detailed by the evidence, and you cannot find defendant guilty of negligence in so running engine 1241 at the time and place described in evidence.

"5. The court instructs you that the rule of defendant read in evidence that 'all employees are further warned that they must not rely on others to notify them of the approach of a train,' did not require the engineer of 1241 to give plaintiff any warning just before starting said engine, in the absence of knowledge of said engineer that plaintiff was in the act of going upon said track at said time."

Plaintiff's counsel in his opening statement to the jury said that plaintiff was with Dewey at Manila Bay, to which counsel for defendant objected, when the following occurred:

"Mr. Guthrie: I mean he was a sailor in the United States Navy.

"Mr. Watson: I object to that as incompetent, irrelevant and immaterial.

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"The Court: It don't make any difference what his employment has been at other times. It might be a matter of argument when you come to argue the case.

"Mr. Guthrie: I will explain, Your Honor, because I want to keep within the line; the theory upon which I am making these suggestions as to his early experience is, that his past experience has not been such as to qualify him for any form of earning capacity outside of the railroad business and the duties of a sailor.

"Mr. Watson: I object to that because no such allegation is in the petition, no such issue framed here; it is not competent for any purpose under the allegations of the petition here.

"Mr. Guthrie: It may be a question of good faith on the part of counsel. (Reading from petition) 'Was impaired in his earning capacity to the entire extent thereof, and his enjoyment of life and the exercise of his physical faculties was permanently impaired.'

"The Court: That he was with Dewey at Manila that would not—

"Mr. Guthrie: I apologize to the jury on that particular form of expression.

"Mr. Watson: We move that the jury be instructed to disregard that statement.

"Mr. Guthrie: Gentlemen, I apologize to you—that his services in the navy included that particular item of service.

"Mr. Watson: I object to it and move that the jury be discharged.

"The Court: The jury are instructed to disregard those statements which are outside of the evidence."

During the argument of Mr. Guthrie for plaintiff to the jury the following occurred:

"I want to confess to you frankly in this case, that this is a hard case for me to try. Years ago in

the little town from which we came, Louis Ostertag and myself went in the same swimming hole—he is my boyhood friend—and as I think of him there, mangled, torn, bruised, his clothing and his flesh strewn along that rail, his foot hanging to his limb by this battered mass of flesh—as I think, two days after that, of this claim agent for this railroad company—that man just coming out of an operation, in the condition that you understand was inevitable in this case—that ghoul following around that hospital endeavoring to get that man's name to a statement which should damn him in the future—when I think of these practices, gentlemen, it is hard—

“Mr. Watson: I object to any such language as that as incompetent and improper.

“Judge Douglass: We except to that language and ask that the jury be instructed to disregard it, and the jury be discharged.

“The Court: I did not hear the statement.

“Mr. Guthrie: I did not even finish the statement.”

Mr. Guthrie then proceeded to comment on the fact that the court had modified some of defendant's instructions before giving them. Defendant objected, and the court sustained the objection. Mr. Guthrie then proceeded as follows:

“Gentlemen, I say these counsel who are so easily hurt and shocked in their feelings are here like the woman of bad repute who hates to have any suggestion made about virtue in her presence, because it hurts, and because they were trying to argue this case to you—

“Judge Douglass: I object to the remark of counsel for the simple reason that he is imputing improper motives to counsel in the case, and there is no testimony before the court or jury to that effect; we except to it and we ask now that the jury be discharged from further consideration of this case.

## Ostertag v. Railroad.

"Mr. Guthrie: I do impute improper motives—

"The Court: You better stay within the record and not wander around these matters outside.

"Mr. Guthrie: If your Honor please—

"The Court: The attorneys conducted themselves along legitimate lines in the trial of this case.

"Mr. Guthrie: Have I no right to argue that counsel are seeking to mislead the jury?

"The Court: That is not the effect of the way you are arguing.

"Mr. Guthrie: I say to you that in my honest judgment, and I hope it will meet your conviction, gentlemen, the amount claimed here will not compensate him, for what this has meant to him. Put yourself in his place. Consider what it would mean to you, and others similarly situated, and answer that question according to the dictates of your honest judgment.

"Mr. Watson: We object to that.

"Judge Douglass: The courts have said a number of times it is a very improper appeal to the jury to put themselves in the place of plaintiff. We object to it, and now move that the jury be discharged.

"The Court: Yes, sir.

"Mr. Guthrie: I said 'similarly situated.'

"The Court: It is objectionable; I would avoid that."

I. Appellant has chosen to present this case on the theory that the plaintiff stepped on the track in front of a moving engine without looking or listening for its approach. It put in evidence the case of Dyerson v. Railroad, 74 Kan. 528, in support of that theory. It is enough to say that this case does not involve that proposition.

It belongs to that class of cases which involves the

Negligence:  
Starting  
Engine  
Suddenly:  
Evidence:  
Question  
for Jury.

question as to whether an engine in the switch yards was suddenly, without warning, put in motion under such circumstances as to cause an injury to one entitled to such warning. The fact that the engine may have started to move just before plaintiff stepped into the place of danger, under the circumstances of this case, does not transfer this case from the latter class to the former.

Here, the plaintiff walked along by the side of an engine standing still on the track. He was close enough to touch it with his left hand. At his right was the engine of the freight which had "whistled off," had been given the switch, and, according to the evidence for the plaintiff, was starting on its way, the engines on both tracks, according to some of the witnesses, being only a car's length from the clearing point. What is more, engine 1241 had just cleared the track for the freight, and plaintiff, as he left the engine, had said: "Yes, give them a good clear." The circumstances so nearly precluded the thought of starting 1241 over the switch in front of the freight, that the engineer of 1241, on being told of the signal to "back up" said, "What?" The evidence is that the engineer made a quick start. The situation demanded that he should start quickly, or not at all. The evidence was such as to make it clearly a question for the jury as to whether the plaintiff was guilty of the want of ordinary care in attempting to cross track 5 as he did, and whether the engine was started without warning in such a way and under such circumstances as to constitute negligence on the part of the defendant. This case falls clearly within the Tetwiler case, 242 Mo. 178, as to the above questions.

II. This suit is not brought under the humanitarian doctrine, and does not involve it in any way. We shall not discuss the cases cited on that question.

III. Appellant says that it was error to admit in evidence defendant's rule requiring two short whistles in answer to any signal not otherwise provided for. The evidence for defendant was that switch engines in the yards were not required to answer signals with the whistle. The instructions did not submit to the jury any fact involving that rule. If the admission of such rule in evidence was error it was harmless.

IV. Plaintiff's counsel was not guilty of misconduct in saying what he did as to the statement signed by the plaintiff at the request of defendant's claim agent and read in evidence by the defendant. That statement read in evidence was supposed to be harmful to the plaintiff's case. The circumstances under which it was procured were such that we shall not say that counsel exceeded the bounds of propriety in discussing that subject.

As to the other objections made to the conduct of plaintiff's counsel, it is sufficient to say that the defendant did not at the time ask that the counsel for plaintiff be reprovved by the court. The court sustained the objections, and in one case instructed the jury not to consider counsel's statement. In two instances defendant, by reason of such misconduct, asked that the jury be discharged. There is nowhere, so far as we know, any authority for discharging the jury for such cause, though we do not now decide that in no case would such action be proper.

V. Though we have held that the misconduct of plaintiff's counsel in his argument to the jury is not reversible error under the circumstances of this case, yet we take such conduct into consideration in deciding the question of excessive damages, in accordance with the rule in *Applegate v.*

Evidence of  
Company's  
Rules: Not in  
Instructions.

Argument  
of Counsel.

Excessive  
Verdict.



Railroad, 252 Mo. l. c. 202, and Kinney v. Railroad, *ante*, p. 97.

If the plaintiff will, within ten days, enter a remittitur of \$5000 as of the date of the judgment in the trial court, the judgment will be affirmed for \$10,000, with interest at six per cent from the date of the judgment in the trial court; otherwise the judgment will be reversed and the cause remanded. *Williams, C.*, concurs.

PUR CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All the judges concur.

CASES DETERMINED  
BY THE  
SUPREME COURT  
OF THE  
STATE OF MISSOURI  
AT THE  
OCTOBER TERM, 1914.

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MITCHELL FINNEGAN v. MISSOURI PACIFIC  
RAILWAY COMPANY, Appellant.

In Banc, October 13, 1914.

1. **NEGLIGENCE: Semaphore: Purpose.** The system of signals devised to govern the movement of railroad trains, called a "semaphore," consisting in the daytime of oscillating arms or blades elevated above station houses, and in the nighttime of lights displayed therefrom, by which the operator, while at the electric key, can shift the signals so as to indicate to the engineer of an approaching train whether the track is clear or otherwise, was designed to facilitate the movement of trains by requiring a full stop only when an obstruction intervenes, or a stop is necessary for the delivery of orders. Therefore, to accomplish the purpose of a rule declaring that "all trains will approach Cole Junction under full control" two things were primarily necessary on the part of the engineer, namely, to bring his train under full control, and to observe that the signal shone white at night, which white signal indicated that the track was clear and that he was not required to stop for orders. The observance of this rule

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was paramount to all others; and if the engineer had his train under control and ready to stop until he observed the semaphore showed a white light, and then proceeded, and ran into a train on the track, he was not guilty of negligence; and especially, if in addition to the semaphore notice of a clear track, the initial switch lights were "right."

2. ———: ———: **Switch Lights.** A rule that requires trains to "approach the end of double-track junction points prepared to stop unless the switches and signals are right and the track clear" does not mean that the engineer is not authorized to proceed unless the switch lights at the other end of the tracks, pointing away from the train, are right; that would be to give it an absurd construction. If it means the switch lights located at the approach of the junction and those required by another rule in reference to semaphore signals, and the engineer observed both, and both were right, he was not guilty of negligence in proceeding with his train.
3. ———: ———: **Go Ahead Rear End Signal: Conflicting With Semaphore Rule: Presumption of Observance.** A rule declaring that "no freight train must pass any station or siding at which it is not required to stop, without the enginemen receiving go-ahead signal from rear end," if a requirement in addition to the time card rule authorizing the engineer to proceed when the semaphore signal shone white, was in conflict therewith and may be disregarded; and in the absence of any testimony as to whether or not there was a go-ahead signal, even if the rule is of general application, the presumption is that it was observed.
4. ———: **Rules for Operating Trains: Custom.** A usage or custom on the part of trainmen may be shown to be at variance with or in modification of a printed rule, when the company, through its proper officers, had knowledge of its violation; and that knowledge need not be shown to have been actual, but may be implied from the notoriety of the custom or inferred from the circumstances which of themselves would imply notice. And hence, where the evidence establishes that it had become the custom of engineers to slow down their trains until they observed a white light in the semaphore, and then to proceed, an engineer cannot be charged with negligence for proceeding after he had seen said white-light signal, even though there be rules requiring him to approach the junction under full control, and prepared to stop unless there are rear-end go-ahead signals.
5. ———: **Movement of Trains: Full Control: Evidence of Meaning.** The term "full control" as applied to the movement of a train is technical, and while railroad operatives may well understand its meaning, a jury may not, and hence it is

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competent to show by such operatives that it did not mean a full stop of the train; and if the evidence shows that when the freight train was within twelve or fourteen hundred feet of the junction, which the rules required all trains to approach "under full control," the engineer reduced the speed of the train to twelve or fifteen miles an hour, which would have enabled him to come to a full stop in six or seven hundred feet, and then seeing that the initial switch lights were "right" and that the semaphore light showed white, which was a signal that the track was clear, he increased his speed, it is competent for the court to instruct the jury that, if they find this evidence to be true, the rule as to "full control" was complied with.

6. ———: ———: **Expert Testimony: Hauling Train in Usual and Proper Manner.** The usual and ordinary manner of operating railroad trains is a subject of expert evidence. It is proper to permit the train dispatcher, who had charge of the movement of trains on the division on which one freight train collided with another, and knew the significance of train orders, signals and switch lights, to testify as to the purpose and meaning of signals, switch lights, dispatches sent and delivered, and the usual and customary manner of running trains at the point of the accident, for the purpose of enabling the court or jury to fully understand the facts in the given case, in order that the appropriate rules of law may be applied thereto.
7. ———: **Instruction: Trains: Meaning of Orders.** The words "orders" and "rules" as applied to the movement of trains are synonymous, and there is no difference in their practical application. An instruction telling the jury that "the orders to the engineer and signals displayed authorized him," etc., is justified by the evidence, if the rules of the company, or their substituted custom, familiar to every operative, authorized the instruction, for such rules and custom had the practical force and effect of an order.
8. ———: **Rules on Time Card: Judicial Notice.** The court will take judicial notice, if the fact does not appear in evidence, that all train operatives carry the current time card of trains, and that the rules printed thereon are ever present with the engineer of a freight train.
9. ———: **Freight Trains: Ruling Signals: Observance and Abandonment.** The ruling signals by which an engineer of a freight train was to be guided in approaching a junction, under a wholesome and common-sense interpretation of the company's rules in this case, are *held* to have been the initial switch lights and the light displayed in the semaphore; and whether or not those paramount rules, and others read in connection

therewith, were observed, either by a compliance with their terms or in such a manner as to work their abandonment or abrogation, was a matter for the jury, since there was evidence upon which either theory might have been based.

10. **VERDICT: Evidence of Prior Efficiency.** The material issue being the plaintiff's injury, and not his past record, evidence of his efficiency and fidelity throughout a long term of service does not, as a general proposition, help to fix the amount of damages; but where a case presents a flawless trial record, convincing proof of plaintiff's injuries and an absence of evidence of negligence, such evidence is not improper, as supplemental to the main facts; for, it gives moral effect and evidential force to said other facts and thereby assists in determining the amount of damages which should be awarded for the injuries sustained.

11. ———: **Excessive: \$25,000.** Plaintiff, an experienced engineer, thirty-seven years of age, in good health, ran his freight train, without negligence, into another train standing partly on the main track and partly upon the track of a branch road; he was earning \$175 per month, and for eighteen consecutive years he had been in the employ of defendant, half the time as a locomotive engineer, and not a single mark of delinquency mars his record of faithful service; he possessed at all times a cool head, a steady hand and a devotion to a hazardous duty scarcely equalled in the industrial world; as a result of the collision he was rendered unconscious, and covered with muriatic acid, which burned him from the elbows to the finger tips, and from the breast bone to the top of the head; one ear was nearly burned off, his eyes were severely burned, and the ligaments attaching the right pelvic bone to the spine were torn loose, and as a result there has been a distortion or displacement of the entire pelvis; there was curvature of the spine, and the pelvic bone has shifted two and a half inches out of its normal place; one leg is an inch shorter than the other; a scar tissue has formed over his eyes, as a result of the acid burns, destroying the vision of one, save as to perception of light, and lessening the visual power of the other to the extent of nine-tenths of that of a normal eye; and he is now unable to pursue any gainful avocation. The jury returned a verdict for \$50,000, and, upon a motion for a new trial, the trial court required a *remittitur* of \$25,000, and that being filed overruled the motion.

*Held*, by WALKER, BROWN and BOND, JJ., that the judgment for \$25,000 is not excessive. *Held*, by LAMM, C. J., that it is excessive, and that it should be reduced to \$15,000 and then affirmed. BROWN, J., concurs in affirmation, and recalls what was said by him upon the former

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appeal, since what he then said was based upon a misunderstanding of the facts.

*Held*, by WOODSON, J., that the verdict for \$50,000 shows passion and prejudice on the part of the jury; and there being evidence of plaintiff's contributory negligence, that prejudice attaches to the entire verdict, and in consequence the rules for a fair trial require a reversal.

*Held*, by GRAVES, J., with whom FARIS, J., concurs, that for the reasons stated in the opinion of BROWN, J., 244 Mo. 643, and in his own opinion, 244 Mo. 616, on the former appeal, the judgment should be reversed, since the record does not show such a change in the facts as to destroy the legal conclusions there reached.

*Held*, upon *per curiam*, that the parties having, since the opinion was written, filed a stipulation agreeing to a judgment for \$10,000, the judgment is affirmed for that amount.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

**AFFIRMED** (*as per stipulation*).

*Martin L. Clardy* and *Edw. J. White* for appellant.

(1) The trial court should have directed a verdict for the defendant. (a) The plaintiff was guilty of violating every positive and distinct rule of the company, the observance of any one of which would have prevented the accident. He was perfectly familiar with the rules; admitted that they were all in effect at the date of the collision, and he knew that they were adopted for greater safety in the operation of trains, and his wilful failure to obey them caused the loss of life of his head brakeman and fireman, and constituted gross negligence on his part, and he should not be rewarded for the disastrous consequences of his own wrongful act. *Finnegan v. Railroad*, 244 Mo. 608; *Schaub v. Railroad*, 106 Mo. 92; *Francis v. Railroad*, 110 Mo. 395, 127 Mo. 658; *Reagan v. Railroad*, 93 Mo. 348; *Brooks v. Railroad*, 47 Fed. 687; *Railroad v. Nickels*, 50 Fed. 718; *Railroad v. Dye*, 70 Fed. 24; Rail-

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road v. Craig, 80 Fed. 488; Railroad v. Markee, 103 Ala. 160; Railroad v. Williamson, 114 Ala. 131; Railroad v. Free, 97 Ala. 231; Pryor v. Railroad, 90 Ala. 32; Railroad v. Hammond, 58 Ark. 324; Sloan v. Railroad, 86 Ga. 15; Fordyce v. Briney, 58 Ark. 206; Railroad v. Kitchens, 83 Ga. 83; Railroad v. Mapp, 80 Ga. 631; Railroad v. Bragonier, 119 Ill. 51; Abend v. Railroad, 111 Ill. 202; Railroad v. Kastner, 80 Ill. App. 670; Railroad v. Kerwick, 74 Ill. App. 670; Matchett v. Railroad, 132 Ind. 334; Railroad v. Utz, 133 Ind. 579; Railroad v. Lang, 118 Ind. 579; Sedgwick v. Railroad, 76 Iowa, 340; Thoman v. Railroad, 92 Iowa, 196; McAunich v. Railroad, 20 Iowa, 338; Gorman v. Railroad, 78 Iowa, 509; Railroad v. Kier, 41 Kan. 661; Alexander v. Railroad, 83 Ky. 589; Herman v. Railroad, 11 La. Ann. 5; Gordy v. Railroad, 75 Md. 297; Foss v. Railroad, 170 Mass. 168; Benage v. Railroad, 102 Mich. 72; Karrer v. Railroad, 76 Mich. 400; Lyon v. Railroad, 31 Mich. 429; White v. Railroad, 72 Mich. 12; Railroad v. Rush, 71 Miss. 987; Gorham v. Railroad, 113 Mo. 408; Zumwalt v. Railroad, 35 Mo. App. 661; Towner v. Railroad, 52 Mo. App. 648; La Croy v. Railroad, 132 N. Y. 570; Shields v. Railroad, 133 N. Y. 557; Mason v. Railroad, 114 N. C. 718; Bennett v. Railroad, 2 N. D. 112; Wolsey v. Railroad, 33 Ohio St. 227; Cypher v. Railroad, 149 Pa. St. 359; Railroad v. Wilson, 88 Tenn. 316; Railroad v. Smith, 89 Tenn. 114; Murry v. Railroad, 73 Tex. 2; Railroad v. Gray, 65 Tex. 32; Railroad v. Wallace, 76 Tex. 636; Railroad v. Lucado, 86 Va. 288; Darracott v. Railroad, 83 Va. 288; Robinson v. Railroad, 40 W. Va. 583; Eastburn v. Railroad, 34 W. Va. 681. (b) The conduct of the plaintiff was such criminally negligent conduct, inconsistent with the safety of the lives and limbs of the citizens of the State—two of whom lost their lives as a result thereof—that such wanton conduct could not be justified by any custom or practice of the defendant's employees, because such conduct would amount in law

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to criminal carelessness, constituting in the instant case the crime of manslaughter. Custom can never furnish authority for the doing of a grossly negligent act. Concurring opinion Justice Brown, *Finnegan v. Railroad*, 244 Mo. 647; 26 Cyc. 1273; *McDermott v. Railroad*, 87 Mo. 295; *Whaley v. Coleman*, 113 Mo. App. 599; *Keegan v. Kavanaugh*, 62 Mo. 232; *Shartell v. St. Joe*, 104 Mo. 120; *Penney v. Stock Yards Co.*, 212 Mo. 328; *U. P. R. Co. v. Brady*, 161 Fed. 722; *Gilbert v. Railroad*, 128 Fed. 529; *Zentz v. Chappell*, 103 Mo. App. 208. (2) The court erred in admitting illegal and improper evidence on the part of plaintiff. The court committed error in permitting the plaintiff's witnesses to testify what the plaintiff's duty was when approaching Cole Junction, as this usurped the province of the jury, as the rules prescribed his duty and the rules were the best evidence. (a) The opinion of witness Hoffman to the effect that the plaintiff handled his train at Cole Junction in the proper and usual manner, was a mere conclusion of the witness in direct violation of the defendant's rules. (b) The plaintiff's testimony about the message that trains 15 and 16 had left, and also his conclusion about what the switch lights at Cole Junction meant at night, were his mere conclusions as to ordinary language, which the jury could understand, as well as the plaintiff and it was incompetent. (c) The plaintiff's statement that the way he came into Cole Junction was the usual and customary way of running into Cole Junction, was a mere conclusion of the witness. (d) The plaintiff's testimony about who usually threw the switches there for the river route was incompetent. (e) The blank register slip, defendant's form 319, providing that operators should have the same confirmed by the train dispatcher, as to correctness, before entering on the train register, for the reason that no such register slip was used by the plaintiff's train at the time of his injury, and such blank register slip was incompetent



for any purpose. (f) The conclusions and opinions of the plaintiff's witness, the restaurant-keeper, McGinn, that at the time in question plaintiff's conduct in running into the freight train on the river track was a compliance with the time card and the defendant's rule No. 98, as this was the very issue the jury were called upon to decide, and the witness's opinion was in the teeth of the majority opinion of this court when the case was here before. 1 Wigmore on Evidence, sec. 97. The mere declaration of witnesses as to their opinion of a course of dealing, and the existence of a custom, is not evidence of the obligations resting upon them. *Cotton Press Co. v. Stanard*, 44 Mo. 71; *Percell v. Railroad*, 126 Mo. App. 43. (3) The court erred in giving illegal and improper instructions at the request of the plaintiff, over the defendant's objections and exceptions. (a) The plaintiff's first instruction submitted the case to the jury upon the plaintiff's right to proceed at Cole Junction because of the "orders to plaintiff and the signals displayed," as authority for him to proceed as he was, when no "orders" to proceed in such a manner were introduced in evidence at all, and all of the testimony showed that the switch signals, which amounted to a stop signal, were not "displayed," because of the freight train on the river route between the plaintiff and the switch lights, at the time of the collision, and the order board, under the circumstances, was not a "signal displayed," which would authorize the violation of the defendant's rules, and the conclusion that the plaintiff was exercising "ordinary care," at the time of running into the defendant's freight train on the river division was in direct violation of the opinion of this court in this case. *Finnegan v. Railroad*, 244 Mo. 608. (b) The court erred in giving the plaintiff's second instruction, because in this instruction the court told the jury that while the plaintiff would be barred of recovery if his injuries were contributed to by any violation of the

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defendant's rules, "in force at said time and which had not been abrogated or abandoned by defendant, still if you further believe and find from the evidence that at and before the time of the plaintiff's injuries it was the custom and usage among engineers of the defendant to disregard the rule or rules at the point in question, and that the defendant's superior officers and representatives in charge and control of said engineers knew of and acquiesced in said custom and usage, then said rule or rules would be abrogated at said point," as such rules could not be lawfully abandoned, and if they could there was no testimony to base any abrogation or abandonment of the defendant's rules upon, nor a scintilla of evidence that any of the defendant's officers or agents acquiesced in any custom at variance with the duties and proper enforcement of said rules. (4) The damages assessed by the jury, after the *remittitur* by the trial court, are grossly excessive. *Finnegan v. Railroad*, 244 Mo. 608; *Dutcher v. Railroad*, 241 Mo. 177; *Partello v. Railroad*, 217 Mo. 645; *Lessenden v. Railroad*, 238 Mo. 247; *Cook v. Railroad*, 94 Mo. App. 417; *Chitty v. Railroad*, 166 Mo. 435; *Whalen v. Railroad*, 60 Mo. 323.

*Walsh, Aylward & Lee* and *E. R. Morrison* for respondent.

(1) Under the former decision in this case the present judgment should be affirmed. *Finnegan v. Railroad*, 244 Mo. 608. (2) (a) Plaintiff ran his train according to the customs and according to the rules as interpreted by him. If the rules should be interpreted otherwise, then they had been abrogated. *Barry v. Railroad*, 98 Mo. 62; *Lowe v. Railroad*, 89 Iowa, 427; 20 Am. & Eng. Ency. Law, 109; *Railroad v. Caraway*, 77 Ark. 105; *Haynes v. Railroad*, 143 N. C. 154, 9 L. R. A. (N. S.) 972. (b) Whether the switch light at the junction point was a ruling signal as ap-

plied to plaintiff's train was a question of fact for the jury. (c) The testimony at the present trial was stronger than at the previous trial and the language of KENNISH, J., in his opinion upon the former appeal is applicable here. *Finnegan v. Railroad*, 244 Mo. 660. (d) Plaintiff's case is strengthened by the definition of "full control" given at the request of the defendant. (e) The evidence shows that plaintiff complied with the rule as construed by him and his witnesses. *Railroad v. Mortensen*, 27 Tex. Civ. App. 106; *Hall v. Railroad*, 46 Minn. 439; *Penn Co. v. Roney*, 89 Ind. 453; *Railroad v. Parker*, 131 Ill. 557; *Maehren v. Railroad*, 98 Minn. 375; *Yongue v. Railroad*, 133 Mo. App. 141; *Hunn v. Railroad*, 78 Mich. 526, 7 L. R. A. 500. (f) The rules must be construed with reference to the particular conditions existing at Cole Junction. (3) There was no error in plaintiff's instructions. *Carter v. Exposition Co.*, 124 Mo. App. 538; *Holland v. McCarty*, 24 Mo. App. 112; *Feary v. O'Neill*, 149 Mo. 474. (4) There was no error in admission of testimony. *Brunke v. Tel. Co.*, 115 Mo. App. 39; *Ridenour v. Mines Co.*, 164 Mo. App. 592. (5) The judgment is not excessive. *Gordon v. Railroad*, 222 Mo. 516; *Corby v. Telephone Co.*, 231 Mo. 417; *Markey v. Railroad*, 185 Mo. 348; *Yost v. Railroad*, 245 Mo. 252; *Clark v. Railroad*, 234 Mo. 396; *Waldhier v. Railroad*, 87 Mo. 37; *Burho v. Railroad*, 140 N. W. 300; *Railroad v. Brogan*, 151 S. W. (Ark.) 699; *Hackett v. Railroad*, 170 Ill. App. 140; *Perkins v. Sunset T. & G. Co.*, 155 Cal. 712; *Zibbell v. Railroad*, 116 Pac. (Cal. 1911) 513; *Railroad v. Webster*, 137 S. W. (Ark. 1911) 1103; *John v. Railroad*, 111 Pac. 632; *Railroad v. Matkin*, 142 S. W. (Tex. Civ. App. 1911) 604; *Railroad v. Gray*, 137 S. W. (Tex. Civ. App. 1911) 729; *Huggins v. Railroad*, 79 S. E. (S. C. 1913) 406; *Jenkins v. Railroad*, 145 N. W. (Minn. 1913) 40; *Railroad v. Shelton*, 69 S. W. (Tex. Civ. App. 1902) 653; *Haggard v. Refining Co.*, 132 Iowa, 724; *Whitehead v. Railroad*, 114

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N. W. (Minn. 1907) 254; Snell v. Oil Co., 106 S. W. (Tex. Civ. App. 1907) 170; Railroad v. Wallace, 91 Miss. 492; Retan v. Railroad, 94 Mich. 146; Railroad v. Friedman, 41 Ill. App. 270; Smith v. Whittier, 95 Cal. 279; Railroad v. Dalton, 120 S. W. (Tex. Civ. App.) 240; Railroad v. Connoley, 77 Neb. 254 (1906); Olson v. Gill Home Inv. Co., 108 Pac. (Wash.) 140; Hall v. Railroad, 46 Minn. 439; Railroad v. Vanlandingham, 39 Tex. Civ. App. 206. And the fact that the judgment as it now stands is the same as the first verdict warrants affirmance. Lokar v. Elec. Ry. Co., 94 Mo. App. 485; Shohoney v. Railroad, 231 Mo. 141; Partello v. Railroad, 240 Mo. 142.

WALKER, J.—Action for personal injuries. Second appeal.

On the first trial a verdict was rendered in plaintiff's favor for \$25,000, which upon a review by this court was reversed and remanded. [244 Mo. 608.] Upon a second trial a verdict was rendered in plaintiff's favor for \$50,000, which was reduced by the trial court to \$25,000, and a judgment of *remittitur* entered in accordance therewith, from which judgment defendant appeals to this court.

For eighteen years prior to and including June 21, 1903, the date of plaintiff's injuries, he was employed by defendant in different capacities connected with its train service and for nine years of that time was a locomotive engineer on the division of defendant's railroad between Pleasant Hill and Jefferson City. On the night plaintiff was injured he was running an engine pulling an eastbound freight train consisting of twenty-four cars, twenty-one of which were loaded with live stock, three with dead freight, one of which was muriatic acid, and a caboose. The accident, which resulted in plaintiff's injuries, occurred at Cole Junction, four miles west of Jefferson City; at this point the river route of the defendant's road diverges from

the main line and runs westwardly to Kansas City. Between the Junction and Jefferson City the main line and river route trains use a common track. At Tipton, thirty-four miles west of Cole Junction, plaintiff while *en route*, the night of the accident, received a message from the train dispatcher that certain passenger trains, which, under the rules, had the right of way over plaintiff's train between Jefferson City and the Junction, had reached the latter point; without further notice this gave plaintiff to understand that from the Junction to Jefferson City the road was open for his train.

At the Junction there was a telegraph station, and an operator in charge, whose duty it was to make what railroad men call a "block," by displaying a red light on the semaphore for ten minutes after the arrival and departure of trains from said station; he was also required to open the switch for all west-bound trains running from the main line over the river route, and to close the switch after the passage of all trains; at night he was required to display a red signal upon receipt of orders of an approaching train, and when a train was using the switch to block the main line.

On the night in question, after plaintiff had received his usual orders for the running of the train, and the message at Tipton, the train dispatcher permitted an extra freight train, or one not on the time card, to be run from Jefferson City to Cole Junction. No notice was given plaintiff of the running of this train at either of the telegraph stations he passed after it was ordered out from Jefferson City, and upon his arrival at the Junction no red light on the semaphore notified him of its being there. Under the rules, and as a necessary precaution, he should have been given this notice. The night was dark and a drizzling rain was falling; the plaintiff's engine had an oil headlight, which did not penetrate the darkness more than one hundred feet ahead. When he came around the curve

at Cole Junction the light of the semaphore showed white, and he proceeded on his course. The extra freight was about half on the main line and half on the river route, and plaintiff ran into it, with the result that the fireman and head brakeman were killed and plaintiff was injured. At the time this occurred there was a rule in the defendant's time cards that "all trains will approach Cole Junction and the cross-over just west of the end of the double track at Independence under full control." So far as Cole Junction is concerned, this rule had been in force for more than two years before the accident and plaintiff was familiar with same. The reasonable and proper construction of this rule, according to the plaintiff's testimony, is that he was to approach the Junction with his train under sufficient control to stop same if the order board or red light on the semaphore indicated that the track was not clear, but if the semaphore showed a white light he was authorized to proceed; that on the night in question the message received by him at Tipton informed him that the track was clear for his train from the Junction to Jefferson City, and that this information was confirmed when within fifteen hundred feet of the Junction he saw a white light on the semaphore; that just before this, in compliance with the rule when he reached the whistling post, "he whistled, shut off the steam, let the train drift and set the air brakes a bit until within a quarter of a mile of the board or semaphore, when his speed was not more than twelve or fifteen miles an hour. Upon seeing the white light on the semaphore he released the brakes, let the train drift until within six hundred or seven hundred feet of the board or semaphore, which still showed a white light, when he increased the speed, and noticed nothing unusual until his headlight disclosed a box car across the track, when he shut off the steam and set the brakes, but too late to avoid the collision."

The usual manner of going into Cole Junction, under the rule, was to reduce the speed of the train so that it could be stopped if the order board or semaphore showed a red light, indicating that the track was not clear; if a white light was shown it said, in the dramatic language of counsel for plaintiff, "Come on, come on," and the engineer was safe in proceeding through the station at a speed of from eighteen to twenty-five miles per hour. This custom of approaching the Junction had been in vogue ever since the river route was opened.

The headlight on the engine of the extra train was not visible to one on an engine coming eastwardly on the main line, on account of the headlight of the extra train being obscured by a bluff; the same bluff at the lower end of the train hid the lights on the caboose. Plaintiff, therefore, could see nothing of the obstructing train until it was disclosed by his headlight.

Defendant contends, regardless of the condition and office of the light on the semaphore, that plaintiff should have observed the switch lights at the east end of the yards as he approached the Junction, and have governed his train accordingly. This contention is based on defendant's rule 98, which provides that, "Trains must approach the end of double-track junction points, railroad crossings at grade, and draw-bridges, prepared to stop unless the switches and signals are right and the track is clear." Other rules, which it is claimed plaintiff violated, are also invoked as follows:

"27. The absence of a signal at a place where a signal is usually shown must be regarded as a stop signal.

"106. In all cases of doubt or uncertainty, the safe course must be taken and no risks run.

"108. No freight or work train must pass any station or siding at which it is not required to stop,

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without the enginemen receiving go-ahead signal from rear end."

The testimony of witnesses, many of them present at the time of the collision, and all practical railroad men, is probably the best test as to plaintiff's duty in determining whether he was authorized to pass the Junction upon observing a white signal on the semaphore, regardless of the switch lights.

Norman Crawford, the conductor of plaintiff's train, says: "At Tipton I received a message giving my train the right of way at Cole Junction. We were required to approach the Junction under full control until we saw the board was clear. This the engineer did. I saw the board; it showed a white light. The engineer could have stopped the train had it been necessary, if the light had shown red. I received no orders in regard to the extra freight train with which we collided."

G. E. Goodwin, brakeman on plaintiff's train, was on top of the caboose when they approached the Junction; saw the semaphore; it showed white; the train was under such control it could have been stopped in time if signal had been red. Train was running twelve or fifteen miles an hour as they approached the Junction station. The engineer then increased the speed, and was running at twenty miles an hour when they passed the station.

George L. Shemwell, head brakeman on plaintiff's train, was in the cupola of the caboose before the collision, and saw the light on the semaphore at from three hundred to five hundred feet distant; it showed white. A mile or so before they reached the Junction the engineer began to slow down, and when they reached the curve just west of the station he was running at the rate of twelve or fifteen miles an hour, and ran at this speed for six or seven hundred feet; he then released the air and started up, and at the time of the collision was running at the rate of eighteen or



twenty miles an hour. Witness had noticed a number of trains running through the station; they would reduce their speed until they could see that the board was clear, when, if the light showed white, they would release the air and increase their speed. After the accident he got down out of the caboose, and again examined the light and it still showed white. When he started back to flag, he looked at the board again about ten yards distant, and it still showed clear. Trains are operated at night as in the daytime. He had noticed them run through at night at a speed of thirty or thirty-five miles per hour.

T. G. Morris, day operator at the Junction at the time of the collision, said: "A semaphore signal is regulated by blades by day and by lights at night. On one end of the blade there is a red lens, and when the lever is released it draws the lens up in front of the light and shows red. When the lever is pulled down the light shows white. Trains approaching the Junction from the west cannot see the signal at all until from twelve hundred to fifteen hundred feet therefrom. No trains had a right over plaintiff's train the night of the collision, between Jefferson City and the Junction, after the two trains had arrived at the latter point, of which plaintiff had notice at Tipton. Trains having the right of way would not stop at Cole Junction to register unless the danger signal or red light was shown. By the term 'full control' is meant that a train should approach a station prepared to stop if a danger signal is given, and at Cole Junction the danger signal is given by displaying it on the board or semaphore above the office."

Bob Brunt, a brakeman on a river route train, said: "Our train was headed up almost at right angles to the main line. When trains rounded the curve and saw the order board was clear, they would go ahead with increased speed because it was not neces-

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sary to continue down to the office at a reduced speed, if there were no orders for the train."

Fred Hamrick, employed formerly by defendant as fireman, then as engineer from 1901 to 1905, was familiar with the manner in which eastbound freight trains were run through Cole Junction at the time of the collision. A registry was provided for the conductor to throw off when he had a clearance card; it was customary for the engineer to run down until he could see the board, when, if it was red, he should have his train under such control that he could stop. It was customary to increase the speed if the light showed white; this custom was in force and prevailed generally prior and until June 21, 1903, from his personal knowledge.

F. A. McGinn testified that he had been employed as brakeman and conductor by defendant for seventeen years, up to April, 1903, and had run over the line in question during that time; that it did not require any particular speed in passing the Junction; that a white light on the semaphore indicated safety and clearance, giving the right to the main track, and to keep going. Clearance was given by the operator at Cole Junction to engineers. If an engineer approached the Junction and saw that the semaphore light was white, he then had the right to proceed and increase his speed; that this was the custom on and prior to June, 1903, and had been the custom during witness's employment. The switch light at the junction point where the switch point was toward the east would have nothing to do with the operation of eastbound trains.

Plaintiff's own testimony in this regard was that the engineer did not have to look out for any switch lights except ruling switch lights, ruling switch lights meaning those at the end of the yard where the train is coming in; that coming into Cole Junction plaintiff looked for a switch light at the west end of the yard,

but did not look for a switch light at the junction point, for the reason that the point of the switch there was towards the east; that the switch light at that end would make no difference. It was not customary for the engineer to pay any attention to the switch lights or regulate the running of his train on account of his inability to see them when the switch points were directed away from him as he approached the Junction. It was the operator's duty to show a red light on the semaphore for ten minutes after any river route train had entered the main line, to make a ten-minute block.

W. W. Hoffman, a train dispatcher at Jefferson City for defendant for fifteen years, testified that plaintiff on the day of the accident was running a stock train that had been delayed; that he (witness) wired plaintiff to make good time in order to reach St. Louis for the morning market; that he also wired plaintiff at Tipton that the track was clear of any trains which had the right of way between Jefferson City and Cole Junction over plaintiff's train. Under the custom, plaintiff was not required to stop at Cole Junction unless the order board was against him, but his conductor would throw off a register ticket. This custom had been in force ever since the river route had been in operation. Witness gave the order for the extra train at Jefferson City, the purpose being to give it the right of way between Jefferson City and the Junction over plaintiff's train, and sent an order to this effect to the operator at Cole Junction, whose duty it was, upon receipt of same, to turn the order board red; this order was sent to the Junction thirty or thirty-five minutes before plaintiff's train reached that point. This extra freight train had no class, and in the absence of orders received by plaintiff his train had the right of way over it.

J. F. Fletcher, a section hand, living at the section house just west of the signal board at Cole Junction, was in bed when he heard the noise of the colli-

sion. He jumped up, looked at the semaphore, and saw that it showed a white light. During the month preceding the accident he had frequently seen trains come around the curve from the west, on the main line, check their speed until they could see the signal light, and if it showed clear then increase their speed and go through at twenty miles an hour.

So much for the testimony of witnesses detailing the custom prevailing under the rules relative to trains approaching a junction such as that where the accident occurred. Opposed to the construction placed upon the rules by these witnesses, defendant introduced five or six of its employees who testified to the contrary that it was necessary that an engineer approaching a junction should observe the color of the switch lights, as well as the order board, before passing the station.

As a result of the collision plaintiff was rendered unconscious for probably half an hour. When he regained consciousness he was lying near the track, covered with mud and muriatic acid. The acid had burned him from the elbows to the finger tips; and from the breast bone to the top of his head, one ear being nearly burned off. Upon being taken to the hospital and examined, it was found that his eyes were severely burned, and that the ligaments attaching his right pelvic bone to the spine had been torn loose. For six weeks thereafter he suffered constant pain. He was in the hospital on account of these injuries more than ten months. His disability is permanent. The character of his injuries is graphically described in the composite testimony of four or five medical experts who testified in the case after having examined him at different times. It is as follows: An X-ray examination showed a distortion or displacement of the entire pelvis. There was curvature of the spine, the right pelvic bone was shifted two and a half inches to the right; the adjacent muscles and tendons were thrown

out of equilibrium on account of having been wrenched from their adhesions and from not having normally united; and there was a limited action of the left leg, which was an inch shorter than the other. Plaintiff was in a nervous condition due to injuries to the spinal cord. As a result of burns by the acid, a scar tissue had formed over his eyes, destroying the vision of one, save as to the perception of light, and materially lessening the visual power of the other to the extent of nine-tenths of that of a normal eye. At the time of the injury plaintiff was thirty-seven years of age, in sound health and earning \$175 per month as a railway engineer. He is now unable to efficiently pursue any gainful calling.

We have set forth the material testimony to which the jury gave credence, their finding in the presence of evidence pro and con being final. We find upon comparison a marked difference between the testimony introduced at the trial of the instant case and that at the former hearing.

I. We are confronted at the threshold of defendant's testimony with an array of rules, the alleged violation of which, it is claimed, will preclude plaintiff's recovery. A review of same becomes, therefore, not only pertinent but necessary.

On the time card in effect at the time of the collision in which plaintiff was injured, there appeared, and had appeared on former time-cards, the following rule which we copy so far as it has reference to the Junction, to-wit: "All trains will approach Cole Junction . . . under full control." In addition there were rules numbered respectively 27, 98, 106 and 108, which we have set out in the statement of facts, and will now discuss in connection with the rule on the time card, which had appeared thereon for more than two years before the accident in which plaintiff was

Rules for  
Operating  
Railroad  
Trains.

injured, or from the time the river route had been opened. The rule in regard to approaching the Junction under full control is the one upon which the principal defense is based, and the others may properly be regarded as subordinate thereto. Analysis will demonstrate the correctness of this conclusion. It is evident that the purpose of the principal rule, as with the great majority of rules adopted by railroad companies, was to facilitate business and to minimize or, if possible, eliminate accidents in the operation of trains; and certainly nothing could be more conducive to this end than the requirement that trains approach junction points in such a manner as not to be required in each instance to stop, but to enable them to readily be brought to a full stop if necessity required. Average human experience in these days of expedition authorizes us to take notice of the fact that the dispatch with which the business of railroads is conducted does not admit of trains coming to a full stop at junction points until in each instance it be determined if the track is clear, but in the evolution of rapid transit a system of signals has been devised and generally installed, especially on trunk lines, consisting in the day time of oscillating arms or blades elevated above the stations, which in the night time are provided with lights. This is also called a semaphore system, and through its agency an operator is enabled, while at his key, to shift the signal so as to indicate to the engineer of an approaching train whether the track is clear or otherwise. This system makes the operator, as it was evidently intended he should be, master of the situation at his particular station; and it facilitates the movement of trains by requiring a full stop only when an obstruction intervenes, or it is necessary for the delivery of orders. To accomplish the purposes of this rule two things were primarily necessary on the part of the engineer: One to bring his train under full control, and the other to observe the signal which, if at night, as

in the instant case, shone white, indicated that the track was clear and that he was not required to stop for orders. If this is not the correct construction of this rule, and, in connection with the semaphore signals, its observance is not paramount to all other regulations, then its purpose is defeated and its adoption was an empty formality. The witnesses, all experienced railroad men, whose testimony was given determining credence by the jury, gave the rule the construction stated. In our opinion none other can be given to it without not only destroying the purpose of its adoption, but subjecting an engineer to the consideration, at each junction point, of a maze of rules, the attempted observance of which would only tend to confuse, a consummation not to be desired in the operation of trains freighted with human life or charged with the safe transportation of property.

Rule 27 can have no application here because the signal was shown at the place where same was required to be. Rule 98 was not violated because plaintiff's train in approaching the junction point found the switches right, if they are to be considered as well as the signal. The contention that in approaching a junction point and finding the switches and signals right, the engineer is nevertheless not authorized to proceed unless the switch lights at the other end of the tracks, pointing away from the train, are also right, is, to our mind, absurd, and witnesses who testified to the general application and binding force of this requirement in addition to the observation of the semaphore signal, were not believed by the jury. Rule 98 may, however, be so construed to be in harmony with the time card rule; this will limit the switches or switch lights to be observed by the engineer to those located at the approach to the junction, and not to those located beyond same. If this is not its correct interpretation, then the words, "Trains must approach the end of double-track junction points . . . prepared

to stop unless the switches and signals are right and the track is clear," do not mean what they clearly express, namely, that as the train approaches the junction the engineer must note, first, that the switches are right, second, that the signal is right, and, third, that the track is clear. If it was not intended that the rule was to be observed in the order in which the requirements are stated, and that is the manner in which, under either the rules of common sense or interpretation, it should be construed, why did it not require in addition that the switches, at the point where trains leave a junction, should also be observed by engineers before proceeding on their way? It did not, however, and if it had it would have destroyed the purpose of the signal standing aloft over the station, an arm by day and a flaming light by night, subject to the will and hand of the operator which told the engineer, in a language he could not misunderstand, what he was authorized to do. Rule 106 is precautionary and as the facts here show no negligence it has no application. Rule 108, if it be construed as an additional requirement to the time card rule, is in conflict therewith and may be disregarded. So far as we find from the record there was no go-ahead signal from the rear in this instance, and, in our opinion, none was required. In the absence of any direct testimony on this point, however, we are, if the rule is of general application as contended by appellant, justified in the presumption that it was observed in this instance; if not, defendant has no just ground of complaint.

From all of the foregoing we are of the opinion that plaintiff was running his train in conformity with the paramount rule supplemented by observance of the initial switch light and the semaphore signal. This was the construction placed upon the rule by plaintiff and other train operatives, and it had prevailed uninterruptedly for such a length of time that in the absence of the express rule it could under well estab-



lished principles of law be regarded as a controlling custom or usage. A usage or custom on the part of employees of defendant may be shown to be at variance with or in modification of a rule when defendant has, through its proper officers, knowledge of such violation; nor need it appear that the officers of defendant charged with the enforcement of the rule had actual knowledge of the usage or custom; such knowledge may be implied from the notoriety of the custom or inferred from circumstances whereby they are charged with notice. [Yost v. Railroad, 245 Mo. l. c. 246; Shimp v. Stove Co., 173 Mo. App. l. c. 433; Lowe v. Railroad, 89 Iowa, l. c. 427; Haynes v. Railroad, 143 N. C. 154, 9 L. R. A. (N. S.) 972.]

If, therefore, the construction placed on the rule by the plaintiff and other operatives was the correct one, then he was not guilty of negligence; on the other hand, if the rule was violated as to the manner of its observance, and that manner had prevailed to such an extent and for such a length of time as to become a custom of which railroad officials and employees had notice by reason of its notoriety, then plaintiff's compliance with the custom did not constitute negligence. Hence we hold that in either event plaintiff was not guilty of negligence.

II. It is contended by appellant, however, that if the time card rule be construed so as to authorize the engineer to pass through the Junction without coming to a full stop, if the initial switch lights are right and the signal shows white, that plaintiff is nevertheless, not entitled to recover because it was not shown that he approached the Junction with his train under full control.

The introduction of testimony to determine whether or not the train was under full control was not improper, and it was, therefore, permissible for

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**Train:**  
**Full Control:**  
**Meaning.**

plaintiff and others to testify in regard thereto. [Railroad v. Mortenson, 27 Tex. Civ. App. 106.] Although the term "full control" is terse and the ordinary meaning of the words well understood, as applied to the movement of a train its use is technical, and while railroad operatives would doubtless well understand it, a jury might not, and hence the necessity of its explanation. Plaintiff testified that when within twelve hundred or fourteen hundred feet of the station he reduced the speed of his train to twelve or fifteen miles an hour, which would have enabled him to come to a full stop in six hundred or seven hundred feet; upon his seeing that the semaphore signal shone white, he increased his speed, etc. The conductor of the train testified that plaintiff had it under full control and would have been enabled to come to a full stop before striking the obstruction if the signal had not shone white. Two brakemen testified to a like state of facts. In addition to this testimony, the trial court, at the request of the defendant, defined the meaning of the term "full control" in the following instruction: "The court instructs the jury that the term 'full control' as used in these instructions, means such speed and preparation for stopping as would enable a reasonably competent and skilled engineer while in the exercise of ordinary care, upon the first appearance of danger reasonably to be expected, if any, or upon orders or signals therefor, with reasonable safety to his train, the employees and passengers thereon, to stop a train of cars of like character, similarly equipped, operated upon the same track, in the same direction and under the same conditions at said time and place, before reaching the point of danger so reasonably to be expected, if any." Not only, therefore, was the testimony ample that the train was "under full control" when approaching the Junction, as required by the rule, but the trial court defined the term so clearly that

the jury could not have failed to understand its meaning. There is, therefore, no merit in this contention of defendant.

III. Appellant insists that error was committed in permitting Hoffman, the train dispatcher who had charge of the movement of trains on the division on which Cole Junction was located, to give his opinion as to whether plaintiff handled his train in the usual and proper manner. Hoffman was an expert. To him was entrusted, as is customary in the conduct of a railway's business, the directing of not only when trains should be run, but the manner in which they were to be run. He had before him, when on duty, a record of each train's orders, and its location, if moving under orders and the several operators had performed their respective duties. In the discharge, therefore, of his very responsible duty he knew the significance of train orders, signals and switch lights. The purpose of testimony is to enable a court or jury to fully understand the facts in a given case that the appropriate rules of law may be applied thereto. It was for this purpose that the testimony of this witness was offered; as to its practical value in enlightening the minds of the jury, take for example the evidence in reference to the message received by plaintiff at Tipton, that two certain trains had arrived at Cole Junction. In the absence of testimony given by Hoffman and other witnesses as to its meaning, viz., that it gave plaintiff's train the right of way, it would have had no material significance to the jury. For a like reason it was proper to permit this witness, plaintiff and other experienced railroad men, to testify as to the purpose and meaning of signals, switch lights and the usual and customary manner of running trains into the Junction. The rule is well established that the usual and ordinary manner of operating machinery,

Movement  
of Trains:  
Expert  
Testimony:  
Meaning of  
Dispatches,  
Signals, etc.

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in which we may properly include railroad trains, is a legitimate subject of expert evidence. [Combs v. Rountree Cons. Co., 205 Mo. 367; Ridenour v. Mines Co., 164 Mo. App. l. c. 592.] The testimony offered as to whose duty it was to throw the switch at the Junction, for river route trains, was necessary and proper to show the extent of the control exercised by the operator, and also, as a consequence, to show that he knew or should have known that a train was using the switch, and would set the signal accordingly. This fact being established, the inevitable moral conclusion follows that plaintiff was justified, as he contends, in relying upon the signal to determine if the track was clear.

IV. The correctness of the first instruction given by the court is challenged because the term "the orders to plaintiff and signals displayed authorized him," etc., is used therein, it being contended that no orders had been given or signals displayed, and that there was no evidence relative thereto. It was held in Carter v. Exposition Co., 124 Mo. App. l. c. 538, that the words "rule" and "order" were synonymous terms and included "commands," "instructions" and "directions." Plaintiff was operating his train in conformity with a rule which, being printed upon the time card, was ever with him and before him, for we will take judicial notice of the fact, if it does not appear in evidence, that all train operatives carry the current time card. If not acting under the requirements of this rule, and it had been abrogated by the establishment of a usage or custom which he observed, then this rule or its substituted custom, familiar to every operative from superintendent to section hand, had the practical force and effect of an order, and it is a mere tenuous technicality to contend that the use of the term was unauthorized. There is no difference in actual

Meaning of  
Orders:  
Instructions.

application between a rule and an order. Each emanates from a superior, and each directs a course of action to a subordinate. The words being synonymous, therefore, their use in the instruction was not error.

We have discussed the question as to the display of signals and observance of switch lights, and to avoid prolixity will only say that the ruling lights by which plaintiff was guided, under a wholesome and common-sense interpretation of the rules, were the switch lights at the approach of the Junction, and the semaphore light; but in short as to what were the ruling lights as applied to the operation of plaintiff's train was a question of fact for the jury. They have determined it, and we will not interfere with their finding. The evidence in regard to the manner in which the paramount rule was observed, whether in compliance with its terms or in such a manner as to work its abandonment or abrogation, has been fully discussed heretofore. There was evidence upon which either theory might be reasonably based. This being true, we are inclined to regard defendant's criticism of the second instruction given by the court as without substantial merit. The flippant fling at the witness McGinn in this connection is not warranted by the character of his testimony.

Instruction numbered one requested by defendant was properly refused, as there was evidence sufficient for the jury's consideration as to abandonment and abrogation of the time card rule.

Defendant's second requested instruction was properly refused, because under the testimony the telegram, which in effect told plaintiff that his train had the right of way between Cole Junction and Jefferson City, authorized him, the switch lights and signal being right, to "run the register" at the Junction, a fact disputed by the instruction.

Under the construction we have given the time card rule and Rule 98, defendant's fourth requested instruction was properly refused, and we will not burden this opinion with a further discussion of same, except to say, as heretofore said, that the evidence was much fuller at the trial of the instant case than at its former hearing.

V. The judgment in this case is not excessive. The verdict of the jury was subject to this criticism, but the trial court finding, as we do, that

**Excessive Verdict.** there was ample evidence to sustain a substantial claim for damages, in the absence of reversible error halved the verdict and entered judgment for plaintiff in the sum of twenty-five thousand dollars. This was a just and fair disposition of the case which cannot but meet with the approval of any unbiased examiner of the facts.

Plaintiff was thirty-seven years of age when he received the injuries from the effect of which he is a permanent physical wreck, without earning capacity and compelled, on account of impaired eyesight, to grope his way through life, in daylight, as in darkness. At thirty-seven years of age one should be, and, so far as the record discloses, plaintiff was when injured, in the full flower of mature manhood; he was earning one hundred and seventy-five dollars per month in a calling which requires, at all times, a cool head, a steady hand and a devotion to duty scarcely required in any of the other many responsible vocations in the industrial world; for eighteen consecutive years he had been in the employ of the defendant, half of this time as a locomotive engineer, and not a single mark of delinquency or dereliction of duty marred his escutcheon of service. It may be said that this fact does not help to fix the amount of damages, because the material evidence in regard to the injury, and not plaintiff's past record, is the matter in issue. As a general prop-

osition this is true, but where a case of this character presents a flawless trial record, convincing proof of plaintiffs' injuries and an absence of evidence of his negligence, it is not improper, as supplemental to the main facts, to admit proof of his efficiency and fidelity throughout the long term of his service—testimony of this character will, as it should, give moral effect and evidential force to the other facts and thereby assist in determining the amount of damages which should be awarded the plaintiff for the injuries sustained through the undenied negligence of defendant's operator whose duty it was to display the signals controlling plaintiff's actions. Other things being equal, it will scarcely be contended that the efficient and faithful are not entitled to be more substantially compensated when injured than those whose right is limited to life expectancy and earning capacity. Under this view the judgment rendered is not subject to just criticism.

However, it is but fair to defendant that the amount plaintiff is entitled to recover be measured by the usual standards. Plaintiff, as we have said, was thirty-seven years of age and earning when injured \$175 per month; he might reasonably have looked forward to not less than fifteen years of active service, during which his income would not have been less than that stated; this would have enabled him to earn during the period of his activity a gross sum of thirty thousand dollars, or more than the amount he is awarded in this judgment.

Comparisons might be invoked to determine the reasonableness of this judgment because the books are replete with cases in which judgments for like amounts have been awarded for similar injuries, but we will not further extend the opinion in this regard, because the material affirmative facts here are sufficient to sustain the judgment without the aid that might be afforded by the citation of similar cases.

The trial courts are admonished by section 1850, Revised Statutes 1909, to disregard errors not affecting the substantial rights of the adverse party, and that no judgment should be reversed on account of such defect. A like injunction is laid upon us by section 2082, Revised Statutes 1909. We find no error affecting defendant's substantial rights here, and the judgment of the trial court should, therefore, be affirmed, and it is so ordered. *Brown* and *Bond, JJ.*, concur; *Lamm, C. J.*, concurs, but dissents from amount, and holds that amount of judgment should be \$15,000. *Woodson, J.*, dissents in separate opinion. *Graves, J.*, dissents in separate opinion, in which *Faris, J.*, concurs.

BROWN, J.—I concur in the opinion of WALKER, J., and wish to recall what was said by me when the cause was here upon the first appeal. What I then wrote was based upon a misunderstanding of the facts of this case, and a partial misconception of the law applicable to such facts.

WOODSON, J.—Before the plaintiff would be entitled to a recovery in this case the jury were required to find that the defendant was guilty of the negligence charged in the petition, and that the plaintiff was not guilty of the contributory negligence stated in the answer.

Both of those facts were sharply presented by the pleadings, and there was much evidence introduced by the respective parties tending to prove each of those issues. Not only that, those facts should have been established to the reasonable satisfaction of the jury, solely by the evidence introduced—unbiased by hatred and ill-will, or passion and prejudice.

When I read this record as I did the record of the previous appeal, I became satisfied that the jury here, as there, was not solely governed by the evidence in the case, but largely by their prejudice and passion



against the defendant. This is clearly manifested by the amount of the verdict (\$50,000) and the readiness with which counsel consented to a *remittitur* of \$25,000—one-half of the present verdict, and the full amount of the former.

I repeat here, that where the facts of a case are not conceded or agreed to and where the amount of the verdict, as here, so glaringly discloses the passion and prejudice of the jury against the defendant, we must presume that the same passion and prejudice also unjustly and improperly influenced the jury in passing upon the merits of the case, as well as influenced them in fixing the amount of their verdict. In other words, that prejudice which caused the jury to improperly award the plaintiff three or four times as much as he was justly entitled to, if anything, did also in the very nature of man and things, improperly influence them in passing upon the merits of the case, namely, the question of the defendant's negligence, and the contributory negligence of the plaintiff.

If counsel may be permitted to appeal to the baser elements of man, and thereby procure a verdict upon the merits of the case, as well as for an unjust amount, and then remit a portion of the latter, then by indirection the prejudice and passion of the jury and not its sense of right and justice, would be permitted to meet out right and justice to their fellow-man. And that too, with the sanction and approval of the courts of the land—the fountain-head of law and justice.

For one, I will never lend my sanction to such a monstrous proposition.

I had occasion to mention this matter in the case of *Cook v. Globe Printing Co.*, 227 Mo. 471, l. c. 562; also in my dissenting opinion in this case when here on the former appeal, 244 Mo. 608, l. c. 662.

If counsel will persist in this unjust practice I see no other remedy but to reverse the judgment just so often as the record discloses that abuse of authority.

Counsel should remember that they are officers of the court and have a duty to perform for the State, just as the court has; both are equally interested in the orderly administration of the law, which would be difficult to do without the hearty co-operation of court and counsel.

Of course I recognize that counsel, at times, in the heat and excitement of a trial says and does things which would not be said or done in calmer moments, yet where those things do occur to the injury to either party litigant, it then becomes the duty of the court to correct the injury by such action as may be necessary to accomplish that end; and in this particular case I believe justice will be best served by reversing the judgment and remanding the cause for another trial.

Now, I am not overly sensitive regarding large verdicts and judgments, provided they are commensurate with the injuries sustained. This is evidenced by the fact that the writer has heretofore written the opinions in three or more cases wherein the verdicts of the jury are the largest (if my memory correctly serves me) ever approved by this court.

In a court of justice, justice, right and equity should be judicially administered, not only as to the amount involved, but also as to the merits of the case. The latter constitutes the foundation upon which the former is predicated; and if the foundation is founded upon sand then the fruits of the temple of justice must fall.

GRAVES, J.—Upon the questions discussed in the previous opinions of Judge BROWN (244 Mo. 643-647) and myself (244 Mo. 616-641) in this case, the record now before us has not so changed the facts as to destroy the legal conclusions there reached. Those opinions can be read as my dissent in this case, and

the more curious can read the two records. *Faris, J.*, concurs in these views.

PER CURIAM.—The attitude of the court on the foregoing opinion is defined by the votes of the respective judges thereto appended.

Since the opinion was written, the parties litigant have entered into and filed in this court a stipulation in the words following, to-wit:

“It is stipulated and agreed in the above case that judgment shall be rendered in the Supreme Court in favor of the plaintiff and against the defendant in the sum of ten thousand dollars, and that said judgment shall not draw interest until the first of January, 1915, and that the defendant shall have until on or before the first of January, 1915, to pay said judgment, and if the same is not paid on or before the first of January, 1915, said judgment shall draw interest at six per cent therefrom, and that none of the existing rights of the plaintiff against the sureties on the appeal bond of the defendant shall be affected by this stipulation or judgment.

“It is further understood that the defendant is to pay the costs in the trial court except the plaintiff’s witness fees, which are to be offset against the costs recovered by the defendant in this court in the former appeal.”

It is therefore ordered that the judgment of the trial court be affirmed and that the damages therein be assessed at the sum of ten thousand dollars on the conditions named in said stipulation.

THE STATE ex rel. JOHN SCHMOLL v. JOHN W.  
DRABELLE et al., Constituting Board of Elec-  
tion Commissioners of St. Louis.

In Banc, October 24, 1914.

1. **STATUTE: Repealing Statute Unconstitutional.** If an ostensible statute attempting to repeal certain sections of the Revised Statutes is unconstitutional and void, those sections, upon an adjudication that said repealing statute is void, are left in existence as live law.
2. **UNCONSTITUTIONAL STATUTE: Blanket Ballot Law: Constitutional Majority.** A bill which failed to obtain a majority of all the members elected to either house of the General Assembly, as shown by a count of the recorded vote in the journal of that house, never became a law, although signed by the presiding officer of each and approved by the Governor.
3. ———: ———: ———: **Count: Members Voting Ay as Shown by Journal.** The Constitution (Sec. 31, art. 4) says that "no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of members voting for or against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor." Where, therefore, the whole number of members of the House was 142, a constitutional majority being 72, and the journal of the House in which the ayes and noes were recorded shows only 71 ayes for a certain bill, that bill never became a law, although the journal recites it had received a constitutional majority, and had been signed by the presiding officers of the House and Senate and approved by the Governor. All those constitutional requirements are essential prerequisites to the validity of a law, and one is just as essential as another; and since the Constitution says that a majority of the members to each house shall be recorded on the journal as voting in its favor, unless the journal shows that fact the bill never became a law. Nor can recitals found in the journal to the effect that the bill received a constitutional majority be held to either dispute the recorded vote, or to weaken its effect to the extent of introducing doubt or uncertainty which would preclude courts from interfering.  
*Held*, by GRAVES, J., dissenting, with whom WOODSON, J., concurs, that as the Constitution provides, in the same article, that no bill shall become a law until the same shall have been signed by the presiding officer, and that

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before he shall affix his signature he shall suspend all other business, "declare that such bill will now be read, and that, if no objections be made, he will sign the same to the end that it may become a law," and that "if no objection be made" he shall, in the presence of the House, in open session, and before any other business is entertained, affix his signature, "which fact shall be noted on the journal," and also provides that if any member shall object "that any particular clause of this article of the Constitution has been violated in its passage, such objection shall be passed upon by the House, and if sustained, the presiding officer shall withhold his signature," and that when a bill shall have been so signed in both houses, and approved by the Governor, it "shall become a law," a bill which by the journals is shown to have been signed by the presiding officers of both houses without any objection having been made, and approved by the Governor, should be held to be a law, although a count of the ayes and noes as recorded in the journal of one house shows a majority of the members elected thereto did not vote in its favor; that no objection being offered is strong evidence that no objection in fact existed; and that the provision that any "such objection shall be passed upon by the house" means that it is for the legislative body to adjudicate the question of whether a bill has been constitutionally passed, and that the House, having in this case adjudicated that the bill was legally passed, as is shown by its journal record that it received a "constitutional majority," the court cannot go behind such adjudication.

*Held*, also, that a bill properly attested by the presiding officers of the two houses and approved by the Governor, cannot be impeached in a court by a resort to the journal of one of them. That is the positive trend of modern adjudications, and should certainly be the rule in this State in view of our constitutional provision that "such objection shall be passed upon by the house."

*Held*, also, that if the journal impeaches itself, one part showing the bill did pass and another that it did not receive the necessary constitutional majority, the courts cannot interfere, since the rule everywhere accepted is that if doubt exists as to whether a bill received the necessary number of ayes that doubt must be resolved in favor of the due attestation of the presiding officers and the approval of the Governor; and in this case, not only does the journal say that the bill "was passed" and the memoranda indorsed on the bill say that it was "duly passed," and those recitals are impeached by a count of the names of those voting "aye" recorded in the journal, which shows 72 "ayes" (a bare constitutional majority), whereas by

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counting the names only 71 are found to have so voted, but it also shows that one member is recorded as voting both "aye" and "no," and therefore the journal in the most positive way impeaches itself.

**Mandamus.**

**WRIT ALLOWED.**

*Irwin & Peters* for relators.

*John T. Barker*, Attorney-General, and *Lee B. Ewing*, Assistant Attorney-General, for respondents.

(1) It is necessary that a bill receive a majority of all the members of each house before the same can become a law. Sec. 31, art. 4, Constitution. (2) If the journal of the House of Representatives shows that this bill did not receive a constitutional majority, the same is invalid and never became effective as a law of this State. Sec. 31, art. 4, Constitution; State ex rel. v. Mead, 71 Mo. 266; State v. Ray, 109 Mo. 597; State ex rel. v. Field, 119 Mo. 593; Weyand v. Stover, 35 Kan. 545; People ex rel. v. McElroy, 72 Mich. 447; Speer v. Mayor, 85 Ga. 52; Jennings v. Russell, 92 Ala. 603; Cooley's Constitutional Limitations (5 Ed.), 164-168. (3) Parol evidence is not admissible to contradict the entries in the journal of the House of Representatives. Light & Water Co. v. Lebanon, 163 Mo. 259; Ball v. Fagg, 67 Mo. 484; State v. Wendler, 94 Wis. 369. (4) The Constitution requires the aye and nay votes upon the passage of all laws to be recorded on the journal of each house. The statute rolls themselves may be contradicted by the journal entries and the law itself overthrown, if these entries show, clearly and beyond a doubt, a want of conformity to the mandates of the Constitution. State v. Ray, 109 Mo. 597; State ex rel. v. Mead, 71 Mo. 266. (5) The presumption is always strong that the Legis-

lature has not violated the Constitution in the passage of an act, duly authenticated by the signature of the presiding officer of both houses, approved by the Governor, and certified by the Secretary of State. *State v. Ray*, 109 Mo. 598; *Railroad v. Governor*, 23 Mo. 353; *State v. Peterson*, 38 Minn. 143; *Miller v. State*, 3 Ohio St. 475; *Williams v. State*, 6 Lea (Tenn.) 549; *Supervisors v. People*, 25 Ill. 183; *Larrison v. Railroad*, 77 Ill. 11; *Worthen v. Badgett*, 32 Ark. 496; *State v. Francis*, 26 Kan. 731; *Railroad v. Simmons*, 75 Kan. 130. (6) Every enactment of the Legislature is presumed to be valid until the contrary is shown beyond a reasonable doubt. *State v. Cantwell*, 179 Mo. 280; *Ex parte Loving*, 178 Mo. 203; *Atkins v. Kansas*, 191 U. S. 207; *Railroad v. Simmons*, 75 Kan. 130. (7) Where the entries in the journal of the Legislature are conflicting, so that it is impossible to ascertain therefrom whether the bill was duly enacted, it will be conclusively assumed that the proper constitutional action was taken on same. *Railroad v. Simmons*, 75 Kan. 130; *Homrighausen v. Knoche*, 58 Kan. 646; *State v. Francis*, 26 Kan. 724; *In re Vandenberg*, 28 Kan. 243; *State v. Frank*, 60 Neb. 327.

LAMM, C. J.—*Mandamus*. Original proceeding. The Forty-seventh General Assembly (Laws 1913, p. 327) ostensibly passed an act relating to elections repealing sections 5891, 5893 and 5900, Revised Statutes 1909, and enacting new sections in lieu thereof prescribing the form of the ballot to be what is popularly known as a "blanket ballot" as over against a "single ballot," as provided by the former statutes, and making other provisions not material here.

The sole question is whether that statute was passed in accordance with the safeguards and mandatory provisions of the Constitution. If yea, the writ does not lie. If nay, the writ should go requiring ballots to be printed in ribbon or single form.

The constitutional provision, said by relator to be violated, reads, as set forth in Revised Statutes 1909 (Const., sec. 31, art. 4):

“No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor.”

(*Nota bene*: As printed in Revised Statutes 1909, the words, “the vote be taken by *years* and nays,” are used. The use of the word *years* instead of “yeas” is the product of slovenly proof-reading. A reference to the Constitution as printed in former revisions shows this to be so.)

A constitutional majority of the house was seventy-two. Bearing that in mind and conceding, as respondents formally do, that the petition is sufficient in form, the remaining facts are agreed to and are summarized as follows in respondents’ statement of the case:

“That this act, known as House Bill No. 476, was introduced into the House by Mr. Orr on the 27th day of January, 1913 (House Journal, page 353); on February 3d the same was read a second time and referred to committee on elections (House Journal, page 547); on February 14th it was taken up for engrossment and placed on informal calendar (House Journal, p. 559); on February 26, 1913, it was twice amended in the House (House Journal, pages 1280, 1281); on March 5th it was reported duly engrossed (House Journal, pages 1662-1665); on March 12th it was placed on the informal calendar (House Journal, page —); on March 15, 1913, the bill was called up by Mr. Orr and the same was taken up for third reading and placed on final passage. The *aye* and *nay* vote was recorded, and the ~~same~~ was 71 *ayes*, 51 *nays*, *absent* 19, *absent with leave* 2. This would make a total of



143 members, which is one more than the total membership of the House of Representatives. This is accounted for by the fact that Mr. Overall was recorded as voting both for and against the bill. There being 142 members in the House, 72 votes were necessary to constitute a majority. *If Mr. Overall's name was disregarded, the Journal shows the bill received but 70 votes. If his name is regarded as having been erroneously tabulated as against the bill, the Journal shows it had but 71 votes* (House Journal, pages 2365-2366).

"After the aye-and-nay vote had been taken, Mr. Orr moved that the vote by which the bill was passed be reconsidered, and that motion lie on the table. This motion carried. (House Journal, 2366.) The bill went to the Senate and was reported back to the House on March 20th by the Secretary of the Senate as having been passed by that body. On March 21, 1913, the bill was read at length, and was signed by the Speaker in open session in the House of Representatives. (House Journal, page 3213.) It received the approval of the Governor April 7, 1913.

"It is apparent that the House clerk made a clerical error in recording the aye and nay vote on the bill. His totals show aye 72, nay 51, absent 17, absent with leave 2. The record of the roll call shows aye 71, nay 51, absent 19, absent with leave 2."

A majority of us have come to the conclusion the statute is invalid because of a palpable and transparent vice, a vice safeguarded against in the Constitution, and must fall. With it falls the repealing provision, thus leaving the former statutes (ostensibly repealed) as existing and live law.

The imminence of the general election has created an emergency requiring this case, instituted on the 16th day of October, 1914, wherein an alternative writ went on the 19th, appearance entered on the 20th,

and heard *ore tenus* yesterday, shall be decided today. Mindful of Chaucer's couplet:

“There nis no workman whosoever he be,

That may both worke wel and hastily”—

it would have been better to have handed down a *per curiam* and let the opinion follow in due and orderly fashion, but that course was deemed unwise in this instance.

We are cited to cases from Kansas and Nebraska which, if allowed to control, might lead to a conclusion different from that arrived at and announced by us, *supra*, but an investigation of the Nebraska Constitution (Secs. 8 and 10, art. 3) shows that those sections construed by the Nebraska court differ in essential features from the provision in our Constitution we are called on to construe and apply. In the principal Nebraska case, as we read it (*State v. Frank*, 60 Neb. 327), the *data* before the court showed that part of the essential record had been attached by a pin, and this pin had been removed and the record gone. The case, then, resolved itself into one of a pin lost, a paper lost, hence all was lost—the law going with the pin. In such fix the court upheld the law by a process of *reductio ad absurdum* reasoning, saying: “If counsel are right in their contention, then our important statutes are liable to be annulled by the accidental displacement of a pin.”

The Constitution of Kansas construed by that court in a formidable line of decisions, much relied on by our learned Attorney-General, also differs materially from our own. [Secs. 128 and 131, art. 2, Const. Kan.] Hence the reasoning of that learned court, persuasive so far as applicable, but construing variant constitutional provisions, ought not to control our decision. Like cases make like law, but unlike cases have no such attending benediction.

Certain kindred provisions of our Constitution relating to the passage, verification, etc., of bills are

held directory, but the provision in hand has been held mandatory by this court. [State ex rel. v. Mead, 71 Mo. l. c. 270.] That case adopted a new rule, a new prohibition, and observe (for we stress the fact), to that extent it exploded the common law doctrine relating to the integrity of legislative acts in the passage of bills, and it exploded the doctrine of this court announced in construing our Constitutions existing prior to 1865. The Constitution was written by plain men for a plain and obvious purpose, and is to be construed without refined subtlety, *i. e.*, delicacy of mental action. The provision in hand is cast in language unmistakable, mandatory and of an import not to be misunderstood. It stands on its own reason. *Stat pro ratione voluntas*. But many substantial and controlling reasons might be given did time permit or the occasion demand. Look at it. It starts off with the peremptory phrase, "*No bill shall become a law unless*"—unless what? Unless on its final passage "the vote be taken by yeas and nays." If that were all of it then the fore or aft recital of the journal that the vote was taken by yeas and nays and announcing a result might be sufficient. But the constitution-maker, writing paramount law controlling the legislative law-maker, the courts and the Governor, went further; witness, unless "the names of the members voting for and against the same be entered on the journal," and it did not stop there but goes on to say "and [unless] a majority of the members elected to each house be *recorded thereon* as voting in its favor." All these elements are essential prerequisites to the validity of a law, and one is just as essential as another. The *recording* of the votes is essential. The entering of the names of the voting members on the journal and showing a majority is essential, and the taking of the vote by yeas and nays is essential. Now, by the solemn admissions of our Attorney-General hereinbefore reproduced, that

part of the journal of the House devoted to the constitutional purpose in hand shows the bill did not receive a constitutional majority. No criticism can weaken, no analysis shake and no reasoning can overthrow that monumental fact. There it stands emblazoned on the record so that even he who runs may read. Hence, however much we might agree with counsel that every presumption is allowed in favor of the validity of a law and that courts, to sustain an act of the Legislature, will indulge such presumptions and not declare the law invalid nor make it perish except it be bad beyond a reasonable doubt, cannot apply here. We have written the law too often to the effect that presumptions take flight in the presence of the actual facts not to stand by the doctrine now.

The declarations of the journal that the bill was passed by a constitutional majority (for instance, the casting up of the vote at that figure) and the subsequent and prior entries shown by the journal containing narrations to a like effect are invoked to either dispute the *recorded vote* or to weaken the effect of the vote and introduce doubt and uncertainty whereby, when thus created, it is ingeniously argued the evidence of the journal prepared for a high constitutional purpose may be whittled away or impugned, leaving the law stand because of such doubt. But in a plain case like this such reasoning we deem fallacious. If it be once allowed as sound then the constitutional provision will not be worth the paper it is written on. It will become a mere empty noise, signifying nothing. This is so because it will be found that those journals generally assert their own validity and doubtless no law was ever passed in violation of this provision of the Constitution in regard to which the journal did not contain self-serving narrations announcing or squinting at the validity of the law. As said for this court by SHERWOOD, J., in the Mead case, supra: "It would be but an easy matter by a simu-

lated observance of constitutional forms in the registry of falsehoods upon the journals, to evade and defeat the most rigid provisions of the organic law that the wit of man is capable to devise."

Take a kindred case to illustrate: A judgment of a court of record solemnly entered and rich and full in recitals of service was entered in *Jones v. Smith*. Subsequently it turns out that no service was had on Smith and the fact of no service is made to appear from that part of the record intended to preserve the fact of service, say, the sheriff's return, or, where substituted service has been resorted to, the order of publication and proof thereof. Our reports are full of cases adjudicating that precise question in which we have held that the solemn recitals of the judgment record must fall to the ground on proof of the actual facts. The facts in the case at bar and the facts just hypothesized in the case of *Jones v. Smith* are alike in quality.

I am no stickler for over-refinement in strictness of construction of the Constitution. Let it be reasonably construed and without sticking in the bark—but let it be *enforced* when there are no two ways about its meaning. If the people want another let them get another, but let them get it in a constitutional way and not in an unconstitutional way, to-wit, by judicial action.

Let the final writ go requiring the printing of ballots as prayed for in accordance with sections 5891, 5893 and 5900, Revised Statutes 1909. All concur except *Graves* and *Woodson, JJ.*, who dissent in a separate opinion by *Graves, J*

GRAVES, J.—We do not concur with the views expressed by the majority in the opinion and judgment in this case.

The act in question, the validity of which is challenged by this proceeding, was House Bill No. 476, at the legislative session of 1913. When this bill came up for third reading and passage, and after the vote was taken upon the bill, the record before us from the House Journal shows: "Title to House Bill No. 476 was read and agreed to. Mr. Orr moved that the vote by which House Bill No. 476 was passed be reconsidered, and that motion lie on the table—motion carried." This was on March 13, 1913. On March 20th was this entry: "All other business was suspended, House Bills Nos. 23, 623, 282, 760, 280, 476, 494, 410, 746, 466 and 215 were read at length, and there being no objections, the Speaker, in open session, in the presence of the House, affixed his signature thereto as provided by the Constitution."

The bill had already passed the Senate.

In the record before us we find a full history of this bill from its introduction by Mr. Orr, its author, to the signing thereof by the Governor. The memoranda on the back of the bill read:

House Bill No. 476.

An Act

To repeal sections 5891, 5893 and 5900 of article 5, chapter 43 of the Revised Statutes of Missouri, 1909, entitled "Elections" and to enact new sections in lieu thereof.

Read first time Jan. 27, 1913, and 500 copies ordered printed.

OMAR D. GRAY, Chief Clerk.

Read second time Feb. 3, 1913, and referred to the committee on Elections.

OMAR D. GRAY, Chief Clerk.

Reported from the Committee on Elections Feb. 6, 1913, with recommendation that the bill do pass.

OMAR D. GRAY, Chief Clerk.

Ordered placed upon the informal calendar, Feb. 14, 1913.

OMAR D. GRAY, Chief Clerk.

Taken up Feb. 26, 1913, House amendments Nos. 1, 2 and 3 offered and adopted. Bill as amended ordered engrossed and printed.

OMAR D. GRAY, Chief Clerk.

Reported from the Committee on Engrossed Bills, Mar. 5, 1913, as truly engrossed and correctly printed.

OMAR D. GRAY, Chief Clerk.

Taken up Mar. 12, 1913, and ordered laid on the informal calendar.

OMAR D. GRAY, Chief Clerk.

Taken up Mar. 13, 1913, and read third time, duly passed, title agreed to, motion to reconsider vote by which bill passed tabled.

OMAR D. GRAY, Chief Clerk.

Reported from the House 3-13-13.

R. L. DANIELS, Sec't.

Read first time in Senate 3-14-13.

R. L. DANIELS, Sec't.

Read second time 3-15-13 and referred to Committee on Elections.

R. L. DANIELS, Sec't.

Reported from the Com. on Elections 3-20-13, with the recommendation that the bill do pass.

R. L. DANIELS, Sec't.

Taken up 3-20-13, read third time and placed upon its passage, passed, title agreed to, motion to reconsider vote by which bill passed tabled.

R. L. DANIELS, Sec't.

Reported from the Senate Mar. 20, 1913, as having been duly passed.

OMAR D. GRAY, Chief Clerk.

Reported from the Committee on Enrolled Bills, Mar. 21, 1913, as truly enrolled. All other business being suspended, bill read at length, officially signed by the Speaker, Mar. 21, 1913.

Delivered to the Governor.

OMAR D. GRAY, Chief Clerk.

On April 7, 1913, the Governor signed the bill and returned it to the Secretary of State, and later it appeared in the Laws of 1913, at pages 327 and 328.

As conclusive evidence of the invalidity of this bill the relator urges the following portions of the House Journal:

Thursday, Mar. 13, 1913.

Mr. Orr called up House Bill No. 476 from the informal calendar and moved that the bill be taken up for third reading and placed on its final passage.

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Motion carried.

House Bill No. 476 entitled

An Act to repeal sections 5891, 5893 and 5900 of article 5, of chapter 43 of the Revised Statutes of Missouri, 1909, entitled 'Elections,' and to enact new sections in lieu thereof.

Was read third time and passed by the following vote:

**AYES—Messrs.**

Adams	Fugate	McRoberts	Shepperson
Armstrong	Gross	Miller	Somerville
Asbury	Haenssler	Moore (Barton)	Stark
Baskerville	Haskins	Moore (Perry)	Stephens
Bowman	Hay	Morgan	Taylor (Wright)
Boyd	Hays	Oliver	Teel
Bradley	Houx	Orr	Tegethoff
Bretz	Hunt	Overall	Thice
Brown	Huston	Peery	Towe
Calkin	Inglish	Poston	Towson
Clark	Jackson	Proctor	Watson
Colley	Johnson	Remmers	Wilder
Cox	Kayffman	Roney	Wiley
Curran	Kennedy	Salts	Willeford
Dumm	Lyles	Schofield	Wolfe (Jasper)
Eaton	McCarty	Scott	Wright (Carroll)
Erman	McCollum	Shannon	Mr. Speaker-72
Fluty	McKnight	Sharrock	

**NOES—Messrs.**

Barbee	Fields	Moroney	Turley
Bowers	Fulbright	O'Brien	Tyler
Brooks	Harris	Overall	Valentine
Brownlee	Hodges J.	Phelps	Vitt
Brydon	Jones	Richter	Vosholl
Burch	Kyle	Ryan	Walton
Carrington	Langenberg	Schultz	Watts
Cooper	Leazonby	Sheehan	Whitaker
Cornelius	Lloyd	Snodgrass	Wolff (Jefferson)
Correll	Lutes	Swiers	Woods
Darby	McNamara	Swope	Woodward
Dawson	Melvin	Taylor (Texas)	Wright
			(Greene) 51

Dugan Mills Tuggle

**ABSENT—Messrs.**

Blunk	Farrington	Martin	Ratchford
Boone	Hicks	Murphy	Sullivan
Chaney	Hodgdon	Peters	Swearingen
Claiborne	McGrath	Peterson	Taylor
			(Jackson)

Coulter McMillen Praisewater

**ABSENT WITH LEAVE—Messrs.**

Morehead Reyburn Total absent with leave—2.

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This sufficiently outlines the facts. It should be added that the law sought to be abrogated is one which provides for what is called in common parlance a blanket ballot. In other words, a large sheet of paper upon which is printed the ticket of each of the political parties, so that all tickets to be voted appear upon one sheet of paper, instead of having the ticket of each political organization upon independent slips of paper. The manner in which this blanket ballot shall be used by the voter is prescribed by section 5900, Laws 1913, at page 328, as follows:

“Section 5900. *Voting—voter shall proceed, how.* On receipt of his ballot the elector shall forthwith, and without leaving the polling place, retire alone to one of the places, booths or compartments provided to prepare his ballot. He shall prepare his ballot by marking out all the groups other than the one he wishes to vote. After selecting the group he wishes to vote he shall erase or strike out therefrom the name of any candidate he does not wish to vote for and write in the space provided the name of his choice underneath. After preparing his ballot, the elector shall fold the same so that the face of the ballot will be concealed, and the signature or initials of the judges of election may be seen. He shall then hand the ballot to the judge of election selected to take ballots, who shall number the ballot and deposit it in the ballot box: *Provided* that any outside party shall have the right to challenge any voter whom he suspects to be an illegal voter, and the judge[s] shall determine the right of the party challenged to vote.”

This we set out to show the simplicity of the method. The legal questions we formulate and discuss below.

I. Respondent urges that the House Journal entries fail to show that the bill passed by the

constitutional vote of 72. The House was made up of 142 members and it took 72 to be a majority. He further contends that under section 31 of article 4 of the Constitution, this bill did not become a law, because the House Journal did not show that it received 72 votes, as such votes are spread upon the record. This constitutional provision reads:

“No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor.”

Respondent does not refer to sections 37 and 38 of article 4 of the Constitution, which read:

“Sec. 37. No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session; and before such officer shall affix his signature to any bill, he shall suspend all other business, declare that such bill will now be read, and that, *if no objections be made, he will sign the same to the end that it may become a law.* The bill shall then be read at length, *and if no objection be made* he shall, in the presence of the House, in open session, and before any other business is entertained, affix his signature, which fact shall be noted on the journal, and the bill immediately sent to the other house. When it reaches the other house, the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceedings shall thereupon be observed in every respect, as in the house in which it was first signed. If in either house any member shall object that any substitution, omission or insertion has occurred so that the bill proposed to be signed is not

the same in substance and form as when considered and passed by the house, *or that any particular clause of this article of the Constitution has been violated in its passage, such objection shall be passed upon by the house*, and if sustained, the presiding officer shall withhold his signature; but if such objection shall not be sustained, then any five members may embody the same over their signatures, in a written protest, under oath, against the signing of the bill. Said protest, when offered in the house, shall be noted upon the journal, and the original shall be annexed to the bill to be considered by the Governor in connection therewith.

“Sec. 38. When the bill has been signed, as provided for in the preceding section, it shall be the duty of the Secretary of the Senate, if the bill originated in the Senate, and of the Chief Clerk of the House of Representatives, if the bill originated in the House, to present the same in person, on the same day on which it was signed as aforesaid, to the Governor, and enter the fact upon the journal. Every bill presented to the Governor, and returned within ten days to the house in which the same originated, with the approval of the Governor, *shall become a law*, unless it be in violation of some provision of this Constitution.”

The italics are ours.

In passing upon the validity of a law, the passage of which is questioned, all the constitutional provisions must be considered, and this we purpose to do.

The purpose of section 31, *supra*, was to have of record the names of those voting for and against the bill. The purpose of section 37 was to silence all objections to the legal passage of the bill. If any clause of the Constitution had not been fully met in the passage of the bill, objections must be made before the signature of the presiding officer is attached thereto, thus certifying the legal passage of the bill. No objection was entered here and the certification

of the legal passage of this bill was permitted to go. This opportunity for objection to the alleged passage of a bill has some meaning. The makers of the Constitution knew, as do we know, that members of legislative bodies keep close tab upon the vote in a closely contested fight. This bill was such a fight. This clause of the Constitution gave a right to object to the signing of the bill if any particular clause of the Constitution had not been observed in its passage. The term "any particular clause" as used in section 37, *supra*, covered section 31, *supra*. If no such objection is offered it is strong evidence of the fact that no such objection existed as a matter of fact.

But this is not all of the meat to be found in section 37 of article 4 of the Constitution, *supra*. In all the cases in this State discussing section 31, *supra*, and holding that this court can go to the journals and declare from them the fact whether or not a bill has legally and constitutionally passed the House or the Senate, no reference has been made to the provisions of section 37, *supra*. Its force and effect have never been discussed in this connection.

Now, note this language in said section 37: "Such objection shall be passed upon by the House." Does this mean that the constitutional and legal passage of a bill shall be adjudged by a court, or does it mean that the fact as to whether or not the bill has been constitutionally and legally passed shall be adjudicated by the legislative body—which passes it? In my judgment it means the latter, and that when such legislative body adjudges its legal passage, as was done in the case of the bill at bar, this court cannot go behind such adjudication of the legislative body.

At common law the courts could not go to journals of a House to impeach a duly certified bill or law. Upon this question in Oklahoma, a State wherein we find a constitutional provision about recording

the "yeas and nays" upon the final passage of a bill, just as we have in this State, the court in *Railroad v. State*, 113 Pac. l. c. 923, said:

"At common law the rule prevailed that the enrolled bill is conclusive and may not be impeached by resort to the legislative journals. [*Rex v. Arundel*, 80 Eng. Rep. (full reprint) 258; *Edinburgh Ry. Co. v. Wauchope*, 8 Cl. & F. 710; *Lon. and Can. L. & A. Co. v. R. M. of Morris*, 7 *Manitoba*, 128.]"

The court then after a review of a great list of cases upon both sides of the question, holds that it is precluded from going behind the certified bill.

Pages 922 and 923 of this opinion by Judge HAYES furnishes instructive reading, and reasoning well worthy of consideration.

In the second edition of *Sutherland on Statutory Construction*, vol. 1, pages 72 and 73, it is said:

"It is no longer true that 'in a large majority of the States' the courts have held that the enrolled act may be impeached by a resort to the journals. A comparison will show that the courts are now about equally divided on the question. *The current of judicial decision in the last ten years has been strongly against the right of the courts to go back of the enrolled act.* Undoubtedly the decision of the Supreme Court of the United States in *Field v. Clark*, 143 U. S. 649, has had much to do in creating and augmenting this current, but it may also be due to the greater simplicity, certainty and reasonableness of the doctrine, which holds the enrolled act to be conclusive. Many courts and judges, while feeling compelled to follow former decisions holding that the enrolled act may be impeached by the journals, have done so reluctantly and have expressed doubts as to the validity of the doctrine, and in many cases, as will appear in the following sections, have qualified and restricted it in important particulars."

The learned author then at section 46, page 74, of the same volume, thus proceeds to give the reasons for the courts' departing from the doctrine of going to the journals:

"There is necessarily a substantial similarity in the manner in which the original material for legislative journals is made up. As business progresses in the legislative body, the secretary or clerk takes down memoranda of what is transacted. His work is facilitated by the use of printed or stensil forms, printed lists of members, for use on roll call, and the like. These memoranda, partly printed and partly written, together with messages, original bills, reports of committees and other documents, all on loose sheets of paper, are the original material for the journal. The memoranda are necessarily hastily made and often in the midst of much confusion and excitement. Sometimes these original memoranda and documents are loosely fastened together, and constitute the journal to which the courts resort in order to determine whether an enrolled bill has been duly passed. Sometimes these memoranda are copied into a book which becomes the authoritative journal by which the existence of legislative acts is tried. In all cases the journals are printed, sometimes from the original memoranda and sometimes from a copy especially made for that purpose. Sometimes there are thus preserved three journals, as it were; the original memoranda and documents, the written and printed journals, and sometimes these all differ each from the others. Sometimes the journals are read and approved, and sometimes their reading is dispensed with, even for the whole session. The unsatisfactory nature of this evidence is frequently pointed out not only by the courts which refuse to resort to it, but also by the courts which do."

The Constitution of the United States, section 5, article 1, provides for the "yeas and nays" upon any

question, and these to be kept in a journal of the house. Yet with this provision, the Supreme Court through the lamented Mr. Justice HARLAN, in *Field v. Clark*, 143 U. S. 672, said:

“The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. *The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.*”

Again the italics are ours. The very limited time at our command precludes us from going further into the great mass of cases holding as does Mr. Jus-

tice HARLAN, but the long list thereof will be found collected and commented upon with painstaking care by HAYES, J., in *Railway v. State*, 113 Pac. l. c. 922 et seq.

That the modern rule is contrary to the rule first announced in this State in *State ex rel. v. Mead*, 71 Mo. 266, is evident. It is also evident that the modern doctrine is in full accord with the views first expressed by this court, through SCOTT, J., in *Railroad v. The Governor*, 23 Mo. 353.

In the majority of the earlier cases and text-books the rule was announced as we announced it in the *Mead* case, *supra*, but the courts have drifted away from these views, until the later and better text-writers were forced to recognize the changed views of the courts. [*Vide Sutherland, supra.*]

But we are not driven to this proposition in the case at bar. Nor are we driven to comment upon the very unreliable source from which our legislative journals are made up and formulated in this State, as elsewhere, but we can, in full reliance, fall back upon section 37 of article 4 of our Constitution, which makes the legislative body the trier of the question now in dispute, and not this or any other court the trier of such question. In none of our cases have we discussed the question in the light of this constitutional provision. When this bill No. 476 was called up before the House under the mandate of section 37, *supra*, the objection could have been made that the journal of the House showed that it had not received a constitutional vote as required by section 31, and such objection would then have become an issue to be tried and determined by the House. In the language of the Constitution "such objection shall be passed upon by the House."

We are therefore of the opinion that this court cannot go back to the journals for the purpose of invalidating this law, and that the law as certified to



by the legislative officials and the Governor is a valid and binding act.

II. Passing now the general proposition, that under the weight of modern authority and under the particular wording of section 37 of article 4 of our Constitution, this court has no right to go to the House Journal to find evidence of the invalidity of this law, we will take the case upon another theory. Grant it (which we do not grant) that the court has the right to go to the House Journal to impeach the law, yet under the evidence before us, the Legislature does not stand convicted of wrongfully promulgating the law in question. Even in those States which hold that the integrity of the law may be impeached by the legislative journals, the further rule is announced that the proof furnished by such journals must be "of the clearest, strongest and most undoubted character." [In re Taylor, 60 Kan. l. c. 92.] To like effect is the statement of Mr. Justice VALENTINE in State ex rel. v. Francis, Treas'r, 26 Kan. l. c. 731, whereat he said: "The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and that it is conclusive evidence of such regularity and validity, unless the journals of the Legislature show, clearly, conclusively and beyond all doubt that the act was not passed regularly and legally. . . . If there is any room to doubt as to what the journals of the Legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid."

Under the rule in the States holding that the law may be impeached by the legislative journals, it must be said that they recognize the further doctrine that

if this sole witness impeaches itself the courts must permit the law to stand. This witness in this case impeaches itself. One part of this record, which we have set out in two parts in our statement, shows that the bill did pass, whilst the other portion shows or tends to show that it did not pass. But this is not all. That portion of the record which tends to show that it did not pass is contradictory. It shows that Representative Overall, both voted *for* and *against* the bill. How could a record more thoroughly impeach itself than is shown by this admitted fact. What more would a court want to say that there was doubt as to the reliability of such a record? If there is doubt as to the reliability of the record, then under all the rules the court must resolve the doubt in favor of legitimate action upon the part of the legislative body, and sustain the law.

In such a case the court not only has the right to say, but should say, that a record, which thus bears upon its face, a slovenly, careless and unreliable make-up, should not be permitted to overcome the solemn certificate of the legislative officials wherein it is said the bill was duly passed. From this record no court could say how Mr. Overall voted. If in the making up of this record from the memoranda made at the time the vote was taken the officer in the House having charge thereof was so careless as to make this mistake, what other mistakes may have been made? Some voting against the bill may have voted for it; some marked absent may not have been absent and may have voted for it. But these are speculations. The idea is that the face of this record condemns its own verity, and it should be discarded. It is clear that the proper officer counting the vote announced that the bill had received 72 or more votes, or it would not have been declared *passed*.

We announce but a general rule when we say that a record which shows upon its face a falsehood should

be discarded by the courts. This record so shows. Upon a roll call of the House Mr. Overall's name could be called but once, and the record clearly falsifies the fact when it records him as voting upon both sides of the question. I care not what other facts may truthfully appear from this record, this irregularity precludes a court from giving confidence to it. But going further it appears that the party who made up this record says that there were seventeen absentees without leave, whilst he makes it appear from a list of the names that there were nineteen of such absentees. It may be that two of the names in the absentee column were present and voted for the bill, but were erroneously put in the absentee column. It is clear that from some source he got the idea of there being only seventeen absentees without leave and two with leave.

These irregularities upon the face of the record impeach that portion thereof relied upon by relator to impeach this law. Thus far we have discussed the irregularities of that portion of the record relied upon by the relator. They are such as to kill its potency as a witness against the validity of the law. The broader question of the condition of the whole record we take next.

III. Going to the whole legislative record as found in the journals of the House, we find that such record declared that House Bill No. 476 was passed, Thursday, March 13, 1913. After its passage as thus declared by the record we find from the same record, on the same day the title was read and agreed to, that Mr. Orr "moved that the vote by which House Bill No. 476 *was passed* be reconsidered, and that the motion lie on the table." The record then says as to this motion: "Motion carried." Throughout the record was the word "passed" which in legal and legislative parlance can have but one meaning, i. e., that it received a constitutional vote. On the

other hand if we take the whole journal record, and strip that part of it relied upon by the relator of all its irregularities and incongruities, and make it say that only 71 votes were cast for House Bill No. 476, yet we have one part of the record contradicting the other, and we are still left in doubt. Again we say where there is doubt the validity of the law must be upheld.

In Kansas where they adhere to the rule that the validity of a law can be impeached by the journal with a fair face, yet under facts exactly parallel to the facts here, that court refused to invalidate a law. Our time is so limited for this opinion, i. e., from 9:30 a. m. to 5 p. m., that we will content ourselves by letting the Kansas court speak for us upon the question. In *Railway Co. v. Simons*, 75 Kan. l. c. 131, JOHNSTON, C. J., thus states his case:

“It is claimed that the statute in question has no legal existence because the Legislature did not fully comply with the constitutional requirements in its passage. The particular defect pointed out is that, according to the House Journal, the act did not receive a constitutional majority of the members of the House of Representatives. The act was designated ‘House Bill No. 979,’ and the entry in the journal, after giving the number and title of the bill, is that it ‘was read the third time, and the question being, shall the bill pass? the roll was called, with the following result: Yeas 83, nays 2; absent or not voting 40.’ Then follows the entry, ‘a constitutional majority having voted in favor of the passage of the bill, the bill passed, and the title, as above was agreed to.’ Immediately following this is a list of 83 names purporting to be the affirmative vote on the bill; then follows a list of two names purporting to be the negative vote, and that is followed by a list of 40 names of members reported to have been absent or not voting.”

The only difference between the facts in that case and the facts in this are: (1) that in the Kansas case the record as to the names of the parties voting for and against the bill, is *fair and regular* upon its face, whilst here it is not; and (2) that the Kansas record says "a constitutional majority having voted in favor of the passage of the bill, the bill is passed, and the title as above, was agreed to" whilst in the case at bar the record simply recites that the bill "passed."

As to the latter proposition there is no difference between the two cases, because in legislative as well as legal parlance a bill is only "passed" when it receives the constitutional vote. When our Speaker of the House declared this bill No. 476 "passed" he declared in effect that "having received a constitutional majority" the said bill "was duly passed." At page 132 of the Simons case Judge JOHNSTON further says:

"It is conceded that the act passed the Senate by an unquestionable majority, was duly approved by the Governor and properly deposited with the Secretary of State. The act upon its face as it is enrolled and printed is in all respects regular, and it is authenticated as the Constitution requires. It is signed by the presiding officer of each branch of the Legislature, the approving signature of the Governor is affixed and it has been duly published in the statute-book as the act itself provides. Although the act has been so certified by the officers having charge of legislation, and bears all the marks of authenticity, it is contended that the recitals in the journal of the House overcome this evidence and show that the act never received the requisite number of votes and therefore never became a law.

"The Constitution provides that the Legislature may 'increase . . . the number of judicial districts whenever two-thirds of the members of each House shall concur (Const., art. 3, sec. 14; Gen. Stat.

1901, sec. 161), and if we assume, as counsel on both sides do, that this means two-thirds of all members elected to each House, and that only eighty-three of the one hundred and twenty-five members of the House of Representatives voted in favor of the bill, it is plain that it did not receive the requisite number of votes.' We have, then, an enrolled bill duly certified and authenticated, an entry in the House Journal that it received a constitutional majority and had been passed, and another entry in the journal that only eighty-three members voted for the measure, which is less than a constitutional majority.

"Two theories obtain as to the method of determining whether what purports to be an act of the Legislature was constitutionally enacted. One, designated as the common-law rule, is that an enrolled bill authenticated and promulgated by the Legislature as having been duly enacted is conclusive evidence of the existence and contents of the act. The other is that when a question arises as to whether an act was constitutionally passed, courts may look beyond the enrolled bill and examine the journals of the Legislature in which are preserved the record of its proceedings to determine the existence and validity of the enrolled bill. There is a great diversity and some fluctuation of judicial opinion upon the question, but the rule that resort may be had to the legislative journals was early announced in Kansas and has been consistently followed from the first . . .

"In Kansas the enrolled bill is regarded as record evidence of the highest character, but not as conclusive evidence. The Constitution provides the manner in which a law shall be authenticated and when it bears these marks of authenticity it should not be lightly overthrown. The Constitution, which provides how a bill shall be passed, approved and authenticated, also provides that each House of the Legislature shall keep a journal of its proceedings while passing such bill,

and hence these journals are constitutional evidence of the principal steps taken by the Legislature during the progress of a bill from introduction to enrollment. The enrolled bills and journals together constitute the evidence of the acts passed by the Legislature and are the only evidence to which courts may look to ascertain whether the Legislature has observed the constitutional requirements in their enactments. The relative dignity and force of the two kinds of evidence have frequently been considered. The rule was tersely expressed by Mr. Justice VALENTINE in *State ex rel. v. Francis, Treas'r*, 26 Kan. 724, wherein he said what has hereinbefore been quoted at page 536.

“In *Homrighausen v. Knoche*, 58 Kan. 646, the validity of an act was challenged upon the ground that a constitutional majority of the House did not vote in favor of the measure. Some of the entries in the journal indicated that a constitutional majority had voted for the bill, while others indicated the contrary, and it was held that the journal did not make that clear and conclusive showing of invalidity which would overthrow the evidence furnished by the enrolled bill. In the case of *In re Taylor*, 60 Kan. 87, the following language was used: ‘While the journals of the two houses may be examined for the purpose of ascertaining whether the legislative branch has expressed its will in accordance with constitutional requirements, yet a legislative measure which has taken upon itself all the forms and appearances of verity which are involved in its enrollment in the office of the Secretary of State, its certification by the President of the Senate and Speaker of the House and its approval by the Governor may not be impeached by the legislative journals except when the proof furnished by them is of the clearest, strongest and most undoubted character.’

“In *State v. Andrews*, 64 Kan. 474, the rule was stated in about the same form except that it was in-

tensified by an additional adverb: 'An enrolled statute imports absolute verity and is conclusive evidence of the passage of the act and of its validity, unless the journals of the Legislature show *affirmatively*, clearly, conclusively and beyond all doubt that the act was not passed regularly and legally.'—(Syllabus.)

"The application of this rule sustains the validity of the statute in question. The presumption of validity which goes with an enrolled bill can never be overthrown by entries in a journal which are themselves inconsistent and contradictory. The journal does not show 'affirmatively, clearly, conclusively and beyond all doubt' that the bill failed to receive a constitutional majority. It is true that the entry of the yeas and nays on the roll call shows but eighty-three affirmative votes, but there is a later entry in the same journal that a constitutional majority did vote for the measure and that the bill passed. The duty devolved upon the Speaker with the assistance of the Clerk to ascertain how many votes were cast for and against the bill, and to decide whether a constitutional majority had voted for its passage. The votes were counted and a decision was made by the presiding officer that a sufficient number of the members had voted for the bill to pass it, and this decision was entered upon the journal. As the Constitution requires each house to keep a journal of its proceedings, a determination and declaration by the House that a constitutional majority of the votes had been cast for the bill was an important proceeding of that body and one properly recorded in its journal.

"It is suggested that the record of the yea and nay vote is a more detailed statement of the proceedings and necessarily better evidence of the legislative action than the statement of the court and decision made by the presiding officer. Each is required to be entered upon the journal, and there is nothing in the language of the Constitution indicating that one is



paramount to the other. If it be granted that, in its nature, the entry of the yea-and-nay vote is more convincing than the entry of the decision that the requisite votes had been cast, the repugnancy and contradiction in the journal remain. The fact that the journal contains entries directly opposed to each other—entries which cannot be reconciled, so that to accept one would be to disregard the other—gives rise to a doubt of the accuracy of the journal itself and makes it clear that under the rule such evidence cannot be used to impeach and overthrow a duly authenticated statute.

“The rule was applied to a somewhat similar state of facts in the case of *In re Vanderberg*, 28 Kan. 243, where it was claimed that an act creating a judicial district did not receive a constitutional majority of the House of Representatives. Some entries in the journal indicated that a majority voted for the bill, while other entries were to the effect that the legal vote cast for the bill lacked one of making the needed majority. After pointing out the repugnant statements in the journal, and showing that upon its face it was conflicting and ambiguous, the court remarked that ‘the enrolled statute is not to be set aside upon mere guesses or surmises nor upon a doubtful interpretation of a journal seemingly contradictory upon its face.’—[Page 257.]

“In explanation of defects and inconsistencies found in the journals of the Legislature it has been said they are ‘hurriedly and sometimes carelessly made. The reading of the same for correction and approval from day to day is frequently dispensed with and therefore it is not difficult to account for ambiguities and inaccuracies that may be found therein.’ [*Homrighausen v. Knoche*, 58 Kan. 646, 649.] Under the methods used in taking and recording the votes of the members mistakes may readily be made. As all familiar with legislative proceedings

know, the clerk uses a printed roll of the members' names, with a column for the yeas on one side and a column for the nays on the other, and as the members answer to the roll call a check-mark or figure is placed in the yea or nay column opposite the names. Sometimes there is a second call of those absent or not voting on the first call, and if they respond other marks are made to designate their presence and the votes cast. Occasionally members change their votes on a measure and this requires a change of the marks already made on the roll; and all must be made amid the hurry and distraction of a busy Legislature. The journal is made up at a later time from this and like memoranda, and it is easy to see how errors might creep into a record made in this way. In speaking of the manner in which the proceedings of the Legislature are recorded, and the weight to be given journal evidence, this court has said: 'It is no reflection upon legislative integrity, no criticism of legislative methods, to say that the journals of the houses are often carelessly, inaccurately and partially kept. They are often hurriedly made up, written by clerks having little aptitude for the work and slight sense of responsibility in its performance. Upon many days, especially as the session advances, the business accumulates, the saving of time becomes important, and the reading of the journal of the preceding day is dispensed with, so that mistakes fail of correction and unfortunately pass into forms of legislative history. It is also a notorious fact that in many cases, to a great extent in all cases, the journals are not made up until after the legislative session is closed. They are then put into such methodical shape as can be done, made up of the loose and disconnected memoranda noted from day to day as the legislative session progresses. These facts justify courts in attaching less weight to journals of legislative proceedings as evi-

dence of the non-enactment of laws than they would otherwise possess.' [In re Taylor, 60 Kan. 87, 93.]

"It appears that on the morning following the passage of the bill in question, the House dispensed with the reading of the journal, and that may account in some measure for the failure of the House to notice or correct the inconsistency of the entries in the journal. However that may be, it is clear that these entries involve too much of inconsistency and doubt to impeach or overthrow a properly authenticated statute."

In Nebraska a similar question is likewise ruled. [State v. Frank, 60 Neb. 327.]

So that we hold that taking the whole legislative record as fully set out in our statement, it is so contradictory as to render its effect *nil* so far as the validity of the act in question is involved.

The law in question is a good law. It stops known political tricks practiced under the single-ticket ballot law. Under the old law a "Democratic ticket" or a "Republican ticket" could be purloined from the judges after the names of the judges had been written upon the back thereof. One desiring to buy votes with certainty could take this purloined ticket and say to the voter whose vote is being purchased, "You vote this ticket that I give you, and bring me back a clean 'Democratic ticket' or a clean 'Republican ticket,' and then you will get your money." The voter could be watched from a distance to see whether or not he juggled with the stolen ticket given to him. In this way there was an endless chain of fraud. The larger ballot provided for by this law is not so easily handled. We believe the law a wise and good one, and that the assault upon its validity has failed. The writ should be denied. *Woodson, J.*, concurs in these views.

## GEORGE TEBEAU v. THOMAS S. RIDGE, Appellant.

## GEORGE TEBEAU, Appellant, v. THOMAS S. RIDGE and EFFIE RIDGE.

In Banc, November 17, 1914.

1. **SPECIFIC PERFORMANCE: Inference of Fact: Deference to Chancellor.** Inferences in their last analysis are but presumptions of a milder sort, and presumptions of fact fly away upon the entrance of proof. Where plaintiff swore that he did not know that defendant had a wife at the time the contract of lease with an option to purchase was entered into, and on the other side there are facts from which it could reasonably be inferred that if plaintiff did not know that defendant was married at that time he ought to have known it, the appellate court will defer to the finding of the chancellor on the point.
2. ———: **Allegation of Ownership.** A decree for the specific performance of a contract for the purchase of land will not be reversed because the petition does not contain an allegation in apt terms that defendant was the owner of the land at the time of bringing the suit, where objection to the petition was first made in the motion in arrest, and the case was tried throughout by both parties as if it contained such allegation and defendant testified he was the owner. [Sec. 2119, R. S. 1909.]
- : **Lease: Consideration for Option to Purchase.** When a lease of land for a period of years contains an option to the lessee to purchase at any time during the period at stipulated prices, the payment of the stipulated rent reserved is a sufficient consideration to support the agreement to convey, and such option is a continuing offer to sell at the price named up to the end of the period. And though such option agreement may not with precision dovetail into the lease contract, yet being a part of the same instrument and having been written by the lessor and signed by both, it will be considered an integral part of the contract.
4. ———: **Equity: Evidence: Finding of Facts Not Pleaded.** In a broad sense an equity suit is to be tried *de novo* on appeal; and though the chancellor may have made findings outside both pleadings and proof, yet the judgment will be affirmed if there is enough in the pleadings and proof to fully uphold the decree.

5. ———: **Wife's Dower: Diminution.** Where the vendee, under a contract for the sale of the land signed by the vendor alone, is entitled to specific performance, there should be a diminution of the purchase price named in the contract by the present value of the wife's inchoate dower, estimated by the tables of mortality and by the statutes of present values of estates less than a fee. In other words, the contract being for the sale of the property for a named price, and that contract being one which, under the evidence, equity, in the exercise of a sound judicial discretion, should enforce, the vendor should not receive the whole purchase price, and then as a reward for his breach of contract be permitted to keep one-third of the title in a life estate in his family, but the value of that inchoate dower should be calculated in the manner prescribed by statute and deducted from the purchase-price agreed upon, and then the title be decreed to be, upon payment of the balance, in the vendee, subject to the wife's inchoate dower. [Overruling *Alple-Hemmelmänn Real Estate Co. v. Spelbrink*, 211 Mo. 671.]
6. ———: ———: ———: **Knowledge That Vendor was Married, etc.** The facts that the vendee at the time that the contract of purchase was signed by the vendor alone did not know that he had a wife; and that the vendor, prior to his refusal to convey the land to the vendee according to the contract, had not requested, and did not intend to request, his wife to sign the deed of conveyance, do not in anywise affect the interest of the wife in the land, nor authorize the court to compel her to convey her dower therein, nor do they preclude the court from decreeing specific performance by a diminution from the purchase price of the value of her inchoate dower. They only go to matters of good faith, as such may affect the vendor or vendee.

Appeal from Jackson Circuit Court.—*Hon. John G. Park*, Judge.

REVERSED AND REMANDED (*with directions*).

*Hadley, Cooper, Neel & Wilson, Boyle & Priest and Scarritt, Scarritt, Jones & Miller* for plaintiff-appellant.

(1) Defendant contends that the petition does not state a cause of action because as he says, "there is no allegation in it that the appellant was the owner of

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the land described." There is no merit in this contention. *Sayre v. Devore*, 99 Mo. 446; R. S. 1909, sec. 1836; *Pomeroy v. Fullerton*, 113 Mo. 440. (2) Specific performance of an optional agreement to sell real estate will be enforced by a court of equity. *Kirkpatrick v. Pease*, 202 Mo. 493; *Real Estate Co. v. Spelbrink*, 211 Mo. 67; *Woodbury v. Gardner*, 77 Me. 69; *Couch v. McCoy*, 138 Fed. 696; *Watts v. Kellar*, 56 Fed. 1. (3) The option to purchase here in question is an integral part of a contract of lease. Every consideration expressed in the lease is a consideration for each and every stipulation of the agreement. The option stipulation should not be criticised by defendant on account of the place it occupies in the body of the written contract, for the instrument was written by Ridge himself and under the well known rules applicable where an agreement is drawn by one of the parties thereto, it is to be construed most strongly against the one that drew it. *Surety Co. v. Pauley*, 170 U. S. 133; *Wilson v. Cooper*, 95 Fed. 225; *Hurley v. Fidelity Co.*, 95 Mo. App. 94. The evidence is uncontradicted that Ridge expressly demanded, in consideration of his agreeing to give the option of purchase in the lease, that he be given free access to, namely, passes, to the baseball park; and in accordance therewith he wrote in the lease the following: "Said Ridge to have free access to said premises on all occasions." This part of the agreement was fully complied with by Tebeau, for he not only gave passes to Ridge but he also gave passes to the ball park to members of Mr. Ridge's family. This alone is a sufficient consideration for the option to purchase. It is not necessary, however, to stand upon this alone, for the authorities are many and conclusive to the effect that the making of the lease and the things therein required to be performed by the lessee, such as the payment of rent, are a sufficient consideration for an option to purchase expressed in the lease. *Jones on Landlord and Tenant*, sec. 387;

18 Am. & Eng. Ency. Law (2 Ed.), 631; Hayes v. O'Brien, 149 Ill. 403, 23 L. R. A. 555; Souffrain v. McDonald, 27 Ind. 269; In re Hunter, 1 Edwards' Ch. (N. Y.) 1; Stansbury v. Fringer, 11 Gill & J. (Md.) 149; 24 Cyc. 1021; Monihon v. Wakelin, 6 Ariz. 225; McCormick v. Stephany, 61 N. J. E. 208. (4) Of course we deny that Ridge had any right or power by his *ipso dixit* to annul this stipulation of the contract or, in other words, withdraw this express option to purchase. And if our contention is sustained, viz., that the stipulation relative to the purchase of the land was one of the mutual or reciprocal stipulations between the parties that constituted a part of the consideration for the others, then it is immaterial whether Ridge attempted to withdraw from it or not. (5) Upon the court ordering specific performance by defendant Thomas Ridge, plaintiff is entitled to a diminution of the purchase price, for Ridge's wife refuses to convey or relinquish her inchoate right of dower.

*Johnson & Lucas* for defendant-appellant.

(1) The petition does not state a cause of action. Anderson v. Gaines, 156 Mo. 669; Gentry v. Rodgers, 40 Ala. 446; Mallinckrodt v. Nemnich, 169 Mo. 397. (a) There is no allegation in it that the appellant was the owner of the land described. (b) The allegation "that plaintiff has faithfully complied with and performed all the terms, covenants and agreements therein contained, and binding or obligatory upon him up to the time of the institution of this suit" is meaningless, because it leaves wholly to conjecture what parts of the contract plaintiff means to say are binding on him. It is not equivalent to saying that plaintiff has kept all the terms of the agreement on his part, and if it were it would not be sufficient. In a suit for specific performance, plaintiff should state specifically and minutely what he has done. (2) The decree is

erroneous on the face of the record. *Baldwin v. Whaley*, 78 Mo. 186; *Needles v. Ford*, 167 Mo. 512; *Schneider v. Patton*, 175 Mo. 684; *Roden v. Helm*, 192 Mo. 71. (a) The court does not find, and could not properly find that appellant was the owner of the land described in the petition, because this is not alleged as a fact in the petition. (b) The court finds that appellant had knowledge that said land was being obtained for a baseball park. There is no such allegation in the petition. (c) The court finds that respondent complied with and performed all the terms, covenants and agreements contained in said agreement and binding or obligatory on him. This finding follows the petition. It meant nothing in the petition and means nothing here. No determination is made as to what covenants were binding on respondent, if any. (d) The court finds that respondent entered upon the said land under said agreement and made valuable and permanent improvements thereon. No allegation in the petition supports this, nor was respondent required by the lease to make any improvements. (e) The court finds that appellant insisted upon free access to the ground as one of the conditions of dealing. This is not alleged in the petition. (f) The court fails to find that defendant had no adequate remedy at law, and properly so, because although this was alleged in the petition, there was no proof of it offered. Yet if plaintiff had an adequate remedy at law, he was not entitled to a decree. (3) The finding and judgment of the court is contrary to the evidence. 1 Page on Contracts, sec. 41; *Turner v. Mellier*, 59 Mo. 536; *Mers v. Ins. Co.*, 68 Mo. 127; *Warren v. Costello*, 109 Mo. 344; *Hollman v. Conlon*, 143 Mo. 378; *Daly v. Carthage*, 143 Mo. 569; *Davis v. Petty*, 147 Mo. 374; *Elliott v. Delaney*, 217 Mo. 19; *Richardson v. Hardwick*, 106 U. S. 252; *Philpot v. Gruninger*, 14 Wall. 570; *Railroad v. Bartlett*, 3 Cush. 224; *Railroad v. Deane*, 43 N. Y. 240; *Brown v. Savings Union*, 134 Cal. 452; *Martin v. Coudrey*, 110



Pac. 451; Gordon v. Darnall, 6 Col. 302; Ford v. Ecker, 86 Va. 79; Houts v. Hillman, 228 Mo. 668; Gottfried v. Bray, 208 Mo. 663; Cady v. Straus, 97 Va. 707; Kirby-Carpenter Co. v. Barnett, 144 Fed. 637.

FARIS, J.—Suit from Jackson county, in equity, for specific performance of a contract to convey land. Tebeau (hereafter called plaintiff to distinguish him, since the case is here on cross-appeals) had a decree against Thomas S. Ridge, hereafter called defendant, but upon the refusal of the court *nisi* to diminish the purchase price by the value of the inchoate dower of Effie S. Ridge, wife of defendant Thomas S. Ridge, hereafter called Mrs. Ridge, said Tebeau appealed.

The status of these appeals, which have been consolidated by stipulation, is, then, that defendant is appealing as against plaintiff, for that the latter obtained any decree whatever; while plaintiff is appealing as against Mrs. Ridge for whom the court found, for that no diminution was decreed to him for the inchoate dower of Mrs. Ridge. The latter does not appeal.

The learned trial court made and filed his findings of fact, which throw much light upon the case made and are, besides, the subject of criticism leveled at them by defendant. For the latter reason and since they succinctly set out the facts and greatly shorten our statement, we set them out, as follows:

“The court being fully advised in the premises, doth find the issues in favor of the plaintiff and against the defendant Thomas S. Ridge, and doth further find from the proofs and evidence that the allegations of fact in plaintiff’s petition are true; that the defendants, Thomas S. Ridge and Effie S. Ridge, are and were at all the times herein referred to husband and wife; that on or about December 31, 1901, the plaintiff and defendant Thomas S. Ridge, for value received, and in consideration of the mutual agreements and covenants therein contained and the rents therein

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reserved, entered into, executed and delivered each to the other, a written agreement in words and figures following, to-wit:

“ ‘This Article of Agreement Witnesseth: That Thomas S. Ridge has this day rented to George Tebeau in the present condition thereof the tract of ground bounded by Olive street on the west, Twentieth street on the south, Prospect avenue on the east and the line of the Kansas City Belt Line Railway on the north in Kansas City, Missouri.

“ ‘It is understood by the clause which follows relative to subleasing that said Tebeau shall have the right to rent the above described premises to others for occasional unobjectionable entertainments.

“ ‘Said Ridge to have free access to said premises on all occasions.

“ ‘Said Tebeau shall have the option of purchasing said property during the first year of this lease at and for the price of \$30 per front foot on Olive, Wabash and Prospect streets, during the second year at \$35, after the second year and until the fifth year at \$40 per foot, and between the fifth and tenth year at and for the price of \$50 per front foot as above measured on the three streets frontage; for the period of ten years from the first day of January, 1902, on the following terms and conditions, to-wit:

“ ‘For the use and rent thereof the said Tebeau hereby promises to pay Thomas S. Ridge or to his order seven hundred dollars per year for the first five years and nine hundred dollars per year for the next five years’ time above stated, and to pay the same quarterly at the first of each quarter; that he will not sublet or allow any other tenant to come in with or under him without the written consent of said Thomas S. Ridge; that all of the property of said Tebeau on said premises, whether subject to legal exemption or not, shall be bound and subject to the payment of said rents; that in default of the payment of any quarterly

installment of rent for ten days after the same is due, he will, at the request of said Ridge, quit and render to him the peaceable possession thereof, but for this cause the obligation to pay shall not cease; and finally, at the end of the term he will surrender to said Ridge, his heirs, or assigns, the peaceable possession of said premises, and at the expiration of said lease the said Tebeau shall have the right to remove from said grounds all buildings erected by him thereon, upon the express condition of his having paid all rents due under this lease and not otherwise.

“ ‘In witness whereof, the parties have subscribed to duplicate copies hereof, to be retained by each party hereto.’

“That said agreement was duly acknowledged by the plaintiff on the 23d day of January, 1905, and thereafter duly recorded upon the records of the recorder's office of Jackson county, Missouri, at Kansas City, on the 26th day of January, 1905, in Book B. No. 959, at page 14 of said records; that defendant Ridge had knowledge that said land was being obtained by plaintiff for a baseball park; that plaintiff has faithfully complied with and performed all the terms, covenants and agreements contained in said agreement and binding or obligatory upon him; that he entered upon the said land under said agreement and made valuable and permanent improvements thereon; that the defendant, Thomas S. Ridge, insisted upon free access to the grounds and games as one of the conditions for dealing; that on or about July 31, 1909, plaintiff exercised the option of purchasing the property described in the said agreement and elected to purchase the same according to the terms of said agreement, at and for the price and sum of fifty dollars per front foot, as measured on said Olive, Prospect and Wabash streets, it being the extension of said Wabash street across said tract of real estate between said Olive and Prospect streets, in Kansas City, Missouri; which said

date, namely, July 31, 1909, being the time of the exercise of the said option and the election by the plaintiff to purchase said property, occurred between the fifth and tenth year of the period of the said agreement and lease; that the amount of frontage of the above described real estate on the streets named in the said agreement, to-wit, Olive, Wabash and Prospect streets, is 1364 feet, and the price thereof fixed by the said agreement at the date aforesaid at fifty dollars per front foot as measured on the said streets is sixty-eight thousand two hundred dollars; that the plaintiff did on July 31, 1909, concurrently with and as part of the transaction of exercising his said option and electing to purchase said real estate under and according to the terms of the said contract, tender and offer to pay to the defendant Thomas S. Ridge the full price of the said real estate, to-wit, the sum of sixty-eight thousand two hundred dollars, in lawful money and legal tender of the United States, and did thereupon, and as part of the same transaction notify said Ridge of his exercise of the said option and his election to purchase said land and of his tender and offer to pay said purchase price thereof, and thereupon the defendant Thomas S. Ridge rejected and refused to accept said tender, and failed and refused to carry out the terms of the said contract and denies any and all liability and obligation to sell or convey the said real property under the terms of the said agreement; that the plaintiff at all times from and after the said date, to-wit, July 31, 1909, has been ready, willing and able to purchase and pay for the real estate according to the terms of said contract, and is now willing and desirous of so doing, and now offers to pay the defendant, Thomas S. Ridge, the price of said land according to the terms of said agreement, and does now request the conveyance of the said real estate to him according to the terms of said agreement.

“The court further finds that the defendant Effie S. Ridge declines and refuses to join her husband, the defendant, Thomas S. Ridge, in any conveyance of said land to the said plaintiff; that the defendant, Thomas S. Ridge has never requested his wife, the defendant Effie S. Ridge, to join him in any such conveyance and does not intend to make any such request of her; that at the time of the making of the agreement aforesaid the plaintiff did not know that the defendant Thomas S. Ridge was a married man.

“The court doth further find and declare that the agreement in the plaintiff’s petition mentioned and set out herein ought to be specifically performed and carried into execution, and the title of the defendant Thomas S. Ridge in and to the land therein described, conveyed or divested out of him and invested in the plaintiff.”

To these facts, which as found by the court were fair and correct, except as may be discussed later on in the opinion, we may add that in February, 1906, plaintiff wrote defendant and requested a waiver of the provision as to subletting, or rather requested the privilege of assigning the lease to another party, though plaintiff was to retain an interest. Defendant wrote to plaintiff on February 3, 1906, saying, “As a matter of course I am willing to do what is right in this matter and will not handicap you in the negotiations contemplated.” To this letter on February 5, 1906, plaintiff wired defendant from Chicago thus: “Do not understand your letter. Wire my expense if you consent to my subleasing park to purchasers of a controlling interest in the Kansas City Exhibition Co.” Defendant in reply on the same day wired plaintiff, “If you will waive purchase-option will consent to sublease.” Plaintiff wired in reply thus: “Prefer running club myself to waiving purchase-option. If I dispose of control and you agree to sublease will increase rent for last five years to twelve hundred dol-

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lars per year." Answering this by wire defendant said: "Purchase-option provision without consideration, therefore not binding. With this understanding only would I consent to sublease." In answer to this plaintiff wired defendant: "Option is not without consideration. Will not agree to such understanding Will you consent to sublease as requested? Question can be raised when option is exercised." This exchange of telegrams ended negotiations till July, 1909, at which time the tender mentioned in the findings of the court was made, and a quitclaim deed of conveyance was prepared and tendered to defendant for his and Mrs. Ridge's execution, which being refused this action followed.

There are but few disputed questions of fact in the case. The insufficiency of the evidence strenuously urged upon us by defendant, arising, for the major part, from alleged defects in the option clause itself and not from any very serious contradictions in the facts shown by the respective parties upon the trial.

There was a contradiction as to whether plaintiff had knowledge when the lease was signed, of the fact that defendant had a wife. This is to be resolved by us upon the proof just as the learned court *nisi* resolved it, since it rests on the one side upon the sworn oath of plaintiff that he was ignorant of the defendant's domestic status, and upon the other side upon inferences and presumptions that if he did not know it he ought to have known it. Since inferences are, in the last analysis, but presumptions of a milder sort and since when proof steps in a presumption must needs fold its tent and steal away, we may well incline in logic as well as in law to the findings on this point of the court below.

The proof showed that at the next nearest birthday anniversary defendant was fifty years of age and Mrs. Ridge was forty-seven; that their anniversaries fell respectively on November 26, 1909, and September

2, 1909. So that the defendant is two years, nine months and six days older than Mrs. Ridge.

If other facts shall become important during the discussion of the points made, we shall state them in the opinion.

I. Three contentions are made by defendant and one by plaintiff in the cross-appeals before us. Defendant carrying upon his appeal the weightier burden strenuously urges (a) that the plaintiff's petition does not state a cause of action; (b) that there was no consideration for the option to purchase, contained in the lease, and (c) that the evidence adduced does not warrant the decree entered below. Plaintiff while perforce expressing his contemplated acquiescence should this court hold against him, yet urges with much earnestness that he is entitled to have the purchase price of the land in dispute diminished by the present value of the outstanding inchoate dower of defendant's wife therein. Three of these contentions go to the question whether there should be a decree at all in favor of plaintiff; the other concerns itself alone with the contents of that decree. We will discuss them in the order stated.

II. The petition on which the case was tried did not aver in apt terms, that defendant Thomas S. Ridge was at the time of the bringing of the suit the owner of the land, conveyance of which, through a decree for specific performance, is here sought; but there was set out in full in the petition the instrument of lease, which contained the option to purchase. No demurrer was filed by defendant, nor even an objection made to the introduction of any evidence in the beginning of the trial; nor was any attention whatever paid to such alleged defect, till by a motion in arrest there was urged

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by defendant as a reason for the arrest of judgment this, among other things, to-wit: "Because the *position* [sic] does not state a cause of action." We know of course that the error noted is either stenographical or typographical.

The most casual examination of the record discloses that both parties treated the case upon the trial as if the petition did state that defendant owned the property; such ownership was admitted in the testimony of the defendant himself, and manifestly this fact throughout the trial was regarded by both sides as a thing conceded. Nor is any contention now being urged by defendant that he did not in fact own the land. He and his wife both swear that he owned it; but while the proof, without objection, expressly showed such ownership, the petition did not expressly aver it. If there were aught of substance in the contention of learned counsel for defendant in this behalf; if their position were not bottomed upon sheer, bald technicality, or even if they had in a timely way lodged objections to the petition, we might pause to examine it more carefully. But their attitude upon the trial regarded, in that they tried this case in every respect as if the averment now contended for had been in the petition, and the fact that they are in no manner hurt, lead us to consider as apposite what was said by GANTT, J., in *Sawyer v. Wabash Railway Co.*, 156 Mo. l. c. 476:

"The parties may try the case as if the omitted averment was in the petition or other pleading, and it is perfectly competent for the court even after verdict to amend in accordance with the proofs. In this case it would have been entirely proper for the court in aid of the verdict to have permitted the petition to have been amended, if defective, and as all the facts are before this court we will, if necessary, treat it as amended. [*Darrier v. Darrier*, 58 Mo. 222.]



“Our statute of amendments is very broad, and we are forbidden to reverse any judgment ‘for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a verdict.’ [Sec. 2113, R. S. 1889; *Seckinger v. Mfg. Co.*, 129 Mo. l. c. 598; *Grove v. Kansas City*, 75 Mo. 672; *Thompson v. Kessel*, 30 N. Y. 383.]

“This doctrine finds abundant support in the decisions of this court construing the statute.

“We are cited to a case in New York which illustrates the exact point under discussion. In *Rowland v. Sprauls*, 21 N. Y. Supp. 895, affirmed 66 Hun, 635, a material allegation of insolvency had been omitted and it was urged by appellant that it was indispensable, but the court said that ‘the evidence, which was admitted without objection, abundantly established the insolvency of the mortgagor. The complaint could have been amended by the trial court, if an amendment was necessary, for it would not have changed the nature of the action. It is not necessary to send the case back for the purpose of amending the complaint. That may be done by the appellate court. . . . The course of the trial was the same as if the complaint had contained the needed allegation, so that the defendant was neither misled nor prejudiced by the omission.’ All of which applies as well to this case.

“It is perfectly plain that the omission to state defendant had not paid this money to the other subscribers in no manner prejudiced the defendant.”

This doctrine is at least salutary, and makes for more expeditious justice, to the great hurt it may be to attenuated technicality, which however is not now to be viewed with such a friendly face as in days of yore. Likewise it is in consonance with what we conceive to be both the letter and the spirit of the Statute of Jeofails (Sec. 2119, R. S. 1909), which statute, in addition to the apposite provisions in the eighth and ninth subdivisions thereof furthermore forbids—not so appositely

mayhap, but nevertheless forbids—us to reverse a case “for any other default . . . of the parties or their attorneys by which neither party shall have been prejudiced.” To the same general import and intent likewise are the provisions of section 2082, Revised Statutes 1909.

Besides this there are cases from other jurisdictions which seem to hold that the vendee does not need to offer proof of the vendor's title; the fact that the vendor assumed to sell raised the presumption of title, naught else appearing. [Prince v. Bates, 19 Ala. 105; Gartrell v. Stafford, 12 Neb. 545.] In this view the setting out in the petition *in haec verba* of the paper containing the option to buy was a sufficient compliance with any requirement to plead ownership in the defendant. We disallow this contention.

III. Was there any consideration to support this option? Upon this phase of the case defendant contends most earnestly that there was not. The point is confessedly troublesome and fairly close. Some one or two facts from the record may help us to determine this vexing point, viz.: defendant himself wrote the instrument of ground lease which contained the option about which this action turns, and both plaintiff and defendant agree that the option to buy upon the very terms and within the very time in said instrument set out, was to be a part of the lease. So much upon the latter point is said in full knowledge of the rule that where parties have reduced their contracts to writing, conversations changing their written agreements, in the absence of fraud averred, are no more to be received or heeded in equity than in a suit at law.

But the point is stressed by learned counsel for defendant that while the option to sell was a part of the ground lease instrument, it was not “*an integral*

*part*” thereof. If by integral part counsel mean an homogeneous part, dove-tailing in logical precision and grammatical and rhetorical construction with what preceded and with what followed it, then the point is well taken. But since the defendant wrote it and is therefore to have invoked against him for that fact a more strict and harsh construction, and since it is all contained in a single document executed by the same signing and at the same time, we do not think the case should break solely upon the fact that it is lacking, in the setting in which we find it, finished completeness. For “integral,” the books say, means “lacking nothing of completeness.” [Webster’s Dictionary.]

Touching an option to buy made by the vendor to his lessee and contained as here in a lease and sought to be exercised only in the last week of a ten-years’ period, Justice FIELD of the United States Supreme Court, in the case of *Willard v. Tayloe*, 75 U. S. 1. c. 564, said:

“The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed. This contract is plain and certain in its terms, and in its nature and in the circumstances attending its execution appears to be free from objection. The price stipulated for the property was a fair one. At the time its market value was under fifteen thousand dollars, and a greater increase than one-half in value during the period of ten years could not then have been reasonably anticipated.”

In the cases of *Tilton v. Sterling Coal & Coke Co.*, 28 Utah, 173, and *Page v. Martin*, 46 N. J. Eq. 585, the

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options to buy were contained in the leases and except for physical juxtaposition, as here in the instant case also, such options were no more "integral parts" of the leases than is the one here. The consideration mentioned in the above cases did not expressly, nor by any implication, refer to the option or include it, nor was it syntactically included, though physically it was in the same instrument. In both cases it was an integral part, in that it was a part of the whole or entire instrument of lease, but homogeneity was there, as here, utterly lacking. Yet it was said by GARRISON, J., quoting from the earlier case of *Hawralty v. Warren*, 18 N. J. Eq. 124:

" 'It is now well settled that an optional agreement to convey, without any covenant or obligation to convey and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be a true consideration for it.' " [Page v. Martin, 46 N. J. Eq. l. c. 593.]

We are fully convinced when an option to purchase is contained in a lease that the payment of the stipulated rent reserved is a sufficient consideration for the agreement to convey, and that such option is a continuing offer to sell at the price named up to the end of the period therein limited; so that the offer may not be withdrawn, within such period, without the consent of the vendee. This view in our opinion is borne out and upheld fully by the above cases as well as by the well-nigh universal holding of the cases and by the language of the textbooks. [*McCormick v. Stephany*, 61 N. J. Eq. 208; *Stansbury v. Fringer*, 11 Gill & J. (11 Md.) 149; *Souffrain v. McDonald*, 27 Ind. 269; *Hayes v. O'Brien*, 149 Ill. 403; 24 Cyc. 1021; *Jones on Landlord and Tenant*, sec. 387; 18 Am. & Eng. Ency. Law, 631; *Willard v. Tayloe*, 75 U. S. 557; *DeRutte v. Muldrow*, 16 Cal. 505; *Corson v. Mulvany*, 49 Pa. St. 88.]

On the other hand the Missouri cases cited by learned counsel for defendant do not in our view bear out their contention upon this point. A fair resume of the cases (largely from plaintiff's brief, but with emendations of our own) follows:

The first case, *Mers v. Insurance Company*, 68 Mo. 127, was a suit upon an insurance policy, and the question was whether or not plaintiff had title to the property which was burned. In an attempt to show title, plaintiff exhibited a lease and also an option to buy. It was not proven or claimed that the lease and the option were in any way connected, nor had the option to purchase ever been exercised. It was therefore held that plaintiff failed to show sufficient title to maintain the action upon the insurance policy.

The next case, *Davis v. Petty*, 147 Mo. 374, was one where defendant entered into a contract with plaintiff for the sale of the west half of certain land for \$640, and further agreed that whenever plaintiff paid him a like sum he would convey to him the east half of the same land. This contract was made August 4, 1888. There was not, as there is in the instant case, any time fixed within which the option was to be exercised. It was not until December, 1894, more than six years after this contract was made, that plaintiff took any steps toward exercising the option contained in said contract. In the meantime, defendant, the owner, had made valuable improvements on the land, costing more than the sale price mentioned in the option. These improvements by defendant were made with plaintiff's knowledge but he said nothing, nor gave any indication that he was ever going to exercise his option to buy. The court held that under all the circumstances of the case, the option contract had been abandoned by the parties and that plaintiff had been guilty of laches in exercising his option. Specific performance was therefore denied. There was no lease in that case.

In the next case, *Warren v. Castello*, 109 Mo. 338, one Mreen in 1884 had given Warren, plaintiff, an agreement to sell her certain land for \$2000 before March 1, 1889. No tender or demand was made during the life of Mreen, but after his death a demand and tender was made to his executrix. It was held that plaintiff, being a married woman, was not capable of making a contract, and that there was no consideration whatever for the option. There was a lease mentioned in this case, but there was not and could not be any claim that the lease was a consideration for the option, because the lease was made long prior to the giving of the option and plaintiff was in possession at that time under the lease. The option agreement stood alone and no consideration was mentioned in it, and none was proven. Pertinent to our point here in issue, the above case (l. c. 343) holds: "The principle on which this seeming exception is based is that the bond or conditional covenant to convey upon the option of the lessee or vendee is a continuing offer on the part of the vendor or owner, until accepted within the time and on the terms limited in the option, and when accepted it becomes a valid agreement, supported by mutual promises of competent parties. [*Willard v. Tayloe*, 8 Wall. (U. S.) 557; *Railroad v. Bartlett*, 3 Cush. 224; *Welchman v. Spinks*, 5 Law Times Rep. (N. S.) 385; *Railroad v. Evans*, 6 Gray, 25; *Waterman on Specific Performance*, sec. 200.]"

The next case, *Elliott v. Delaney*, 217 Mo. 14, was a suit in ejectment. An option to buy figured in this case, but the question of consideration did not arise. In fact, it was conceded by the court that there was a consideration for the option and that the same was valid. This case was reversed and remanded on the ground that the decree entered by the court did not conform to the pleadings in an ejectment suit.

The next case cited by counsel for Mr. Ridge is *Hollmann v. Conlon*, 143 Mo. 369. In that case there

was a contract of sale rather than an option, and no lease was involved. Specific performance was denied because plaintiff had not acted within the time specified in the contract of sale, nor had he offered to pay the full purchase price.

It follows, we think, that this contention of defendant is not well taken.

IV. With the contention that the evidence does not warrant the decree, or any decree here for plaintiff, we are likewise unable to agree. Since this case sounds in equity and the findings of the learned trial judge sitting below as a chancellor are not binding upon us, but persuasive merely, we have gone into this point carefully. We set out in the statement the facts as we gather them and find them from the record, and we are convinced that there is enough evidence to fully sustain a decree of specific performance, and that in so holding the trial judge did not err. It would subserve no useful purpose to set out again these facts; it would be but to eat up space. We may give passing notice to the contention of defendant that in the finding of facts made by the trial judge, more was found than was pleaded. We do not think that the record bears out this contention in the sense that the court below so found any vital facts. Some of the things the learned trial court is charged with having thus found without justification from either the petition or the proof, arise as matters of law from the allegations of the petition, e. g., that plaintiff had no adequate remedy at law; others are immaterial, or worse, e. g., that the court, absent an allegation to this effect in the petition, yet found that the land was to be used for a baseball park. But we only mention these things as an evidence that we saw them; since this is an equity case and therefore to be tried in a broad sense *de novo* here, and since we are not bound to follow the learned

Specific  
Performance:  
Sufficient  
Evidence.

chancellor below, unless we find that he was correct. So, if he made findings outside both pleadings and proof, and yet there is enough in the case and in the pleadings and proof to justify us in upholding his decree generally, is there any rule of law which forbids us to do so? We think not and conclude that a decree for specific performance was fully justified by the pleadings and proof. We can not say as a matter of law that an acceptance of a contract to sell in July, 1909, at \$50 a foot, the identical land upon which in 1902 defendant fixed a value of only \$30 a foot, is overreaching, or unjust or unconscionable; *a fortiori*, where the lowest and the middle and the highest prices were all of the defendant's own fixing; nor do we understand that this is urged by defendant. It follows that a decree for specific performance was proper.

V. Which brings us to a discussion of the plaintiff's cross-appeal and requires us to ascertain, if we can, what sort of decree should be entered. Should we affirm the case without diminution of price for the outstanding inchoate dower of Mrs. Ridge, leaving plaintiff to his action at law for relief, if any he has, or will ever have upon the facts here, or should we decree or order a decree for plaintiff after diminishing the purchase price agreed to be paid by the value of Mrs. Ridge's inchoate dower figured upon one-third of such actual purchase price?

As to certain facts of debatable value, but held in some of the cases to be of prime importance, we may state as a foreword that the court below found, as the facts fully warranted him in doing, that plaintiff when he made the lease and got the option in dispute, did not know that defendant was married. It also appears that defendant had not requested, prior to his refusal to convey the land to plaintiff, and did not intend to request Mrs. Ridge, his wife, to sign any con-



veyance of this land to plaintiff. Lest undue importance be attached to legal rules growing out of the absence of plaintiff's lack of information as to the defendant's domestic status, we concede in passing that such ignorance can in no wise affect the interest of Mrs. Ridge herself, nor can she be required by any decree we can make or order, to convey her dower. These things can go only to matters of good faith as such may affect the plaintiff and the defendant.

There is no unanimity of decision on this question of diminution of purchase price. The cases are in much confusion and irreconcilable contrariety. Three views prevail: (1) the purchaser is entitled as against inchoate dower to have the purchase price diminished by such sum as represents the present value of the wife's contingent interest, estimated by the tables of mortality and by the statute of present values of estates less than a fee (*Springle v. Shields*, 17 Ala. 295; *Martin v. Merritt*, 57 Ind. 34; *Noecker v. Wallingford*, 133 Iowa, 605; *Bostwick v. Beach*, 103 N. Y. 414; *Davis v. Parker*, 14 Allen, 94; *Walker v. Kelly*, 91 Mich. 212; *Woodbury v. Luddy*, 96 Mass. 1; *Sanborn v. Nockin*, 20 Minn. 178; *Wannamaker v. Brown*, 77 S. C. 64; *Wright v. Young*, 6 Wis. 127); and in New Jersey when refusal of the wife to convey is fraudulently brought about (*Young v. Paul*, 10 N. J. Eq. 401); (2) the view that the decree of the court may permit the vendee to retain one-third of purchase price as an indemnity until the wife die or convey (*Springle v. Shields*, *supra*; *Bradford v. Smith*, 123 Iowa, 41); and (3) the view that the vendee shall have no abatement of the agreed purchase price on account of the wife's refusal to relinquish her inchoate dower (on the ground usually that such abatement would serve to put upon the wife unfair coercion to relinquish a right given to her by law). [*Barbour v. Hickey*, 24 L. R. A. 763; *Cowan v. Kane*, 211 Ill. 572; *McCormick v. Stephany*, 57 N. J. Eq. 257 (unless wife's refusal was fraudu-

lently collusive with husband, in which case rule in New Jersey is *contra*); *Roos v. Lockwood*, 13 N. Y. Supp. 128; *Riesz's Appeal*, 73 Pa. St. 485; *Graybill v. Brugh*, 89 Va. 895; *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671.]

The last holding in this State was in the *Spelbrink* case, *supra*, where by a divided court of three to four it was held by the majority opinion that the vendee might, if he so wishes, take the title of the husband at the original agreed purchase price undiminished by the inchoate dower of the wife, but that nothing was to be ruled so as to forbid the vendee from suing for his damages by reason of the outstanding inchoate dower of the wife. In the *Spelbrink* case plaintiff knew that the defendant had a wife, and the option provided for a warranty deed. In the instant case plaintiff did not know that defendant had a wife and the option did not provide for a warranty deed.

In reaching the judgment *supra*, it is plain that the order came in a way *ex gratia*; that the majority held to the view that if plaintiff would not take specific performance on the terms of taking that which the husband alone could convey, then he should not have specific performance at all. But let us quote, so that no error from misunderstanding may befall. On page 706 the majority opinion says:

"A court of chancery will not specifically enforce a contract for the sale of real estate against a married man where his wife refuses to join him in the conveyance, without the vendee is willing to pay the full amount of the purchase money and accept a deed from him, alone, and without his wife joining therein, containing the kind and character of covenants and agreements as are called for by the contract. The reason for this principle of equity is that such a court will not lend its aid, even indirectly or remotely, to coerce a wife to relinquish her inchoate right of dower in the face of the statute which expressly provides that the

relinquishment of her dower rights shall be done as her own free act and deed. Besides this, dower has always been considered one of the wards of a court of chancery, and it has even extended its protecting hand to the estates of married women and minors. And if in the face of the statute and the equitable principles mentioned, the court should withhold the payment of a considerable portion of the purchase money during the life of the wife, because she refused to join her husband in the conveyance, or to subject him to an action for exemplary damages, it would be substituting in its decree, coercion and oppression in lieu of justice, equity and good conscience, which have ever characterized its judgments; and it would be no stretch of the imagination to say, that the influence and effect thereof would weigh so heavily upon him that the indirect effect upon her would be so great as to amount to a moral coercion, and as a result thereof she would rather relinquish her dower rights than to see him thus punished on account of her said declination, and thereby deprive her of her free disposition of her marital interest in her husband's real estate.

“There would be no justice or equity in such a decree, but, upon the other hand, it would amount to moral coercion and duress in so far as she is concerned, and if perpetrated upon her by an individual, that is, if he had secured a deed from her by such means, without the intervention of a court, a court of conscience would not hesitate one moment in releasing her from the fetters which bound her thereto. The law will not permit a person to acquire or retain the fruits of a contract obtained by such extortion. [Wilkerson v. Hood, 65 Mo. App. 491.]”

In my humble view the great weight of authority, both of the adjudged cases and the text-writers, adhere to the view that in a proper case “a purchaser of real estate under a contract such as here, that is, an honest one, a fair one, free from covin, overreaching,

or misuse of trust relation—supported by a valid consideration, definite in terms and not obnoxious to the Statute of Frauds—is entitled as of right to performance. The contracting parties write their own law in their contract. Courts sit to enforce the law. Hence they sit to enforce contracts—not abrogate them.” [Dissenting opinion by LAMM, J., *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. l. c. 723.] Should any, or all of the facts, that plaintiff, as here, did or did not know there was a wife in the case, or did not know that such wife would not sign, or that the defendant did not request and would not request his wife to sign, because the agreed sale price was inadequate, or had become so from an undreamed of increase in values, serve to prevent a court of equity in an otherwise just case, from decreeing specific performance? Nevertheless one or more of these reasons is to be found present and controlling in every case where diminution of the purchase price is refused and consequently specific performance denied except upon condition that the plaintiff take such title only as the sole deed of the husband will convey. I say that the authorities ought not to say so, neither do the great weight of them say so, as I read them. Performance in a proper case will, it seems, almost always be decreed, but upon terms differing and utterly irreconcilable. [See cases cited, *supra*, and *Waterman on Spec. Per.*, sec. 511; 26 *Am. & Eng. Ency. Law* (2 Ed.), p. 83; 2 *Story, Eq. Juris.* (13 Ed.), sec. 779; *Pomeroy’s Spec. Per. of Contracts*, 526.] If then such contracts are to be enforced—and the rule is that while the enforcement thereof is in the discretion of the chancellor, the discretion to be used is a sound judicial, and not a capricious, discretion, and also the rule is that other things being equal they are to be enforced—then in my opinion both the weight of authority and the reason of the thing lie with the view that there should be a diminution of the purchase price by the present

value of the wife's inchoate dower. The defaulting option-giver should not get the whole purchase price and then as a reward for his breach of contract keep one-third of the title in a life-estate in the family. Therefore, I am forced by the authorities and the text-writers, as well as by the logic and reason of the case, to follow the dissenting opinion in the Spelbrink case. This is a stronger case than the Spelbrink case; not so much stronger, it may be, as the difference in the rule connotes, but stronger nevertheless, in that plaintiff was in ignorance of the marital status of defendant, and also, in that defendant defiantly—approaching the twilight zone of fraudulently, in a constructive sense—refused to even request his wife to convey her inchoate dower; moreover the estate covered by the letter of the option, while impliedly a fee, was not agreed to be warranted.

As forecast above, the cases which refuse to require specific performance except the plaintiff take that title and estate only which the sole deed of the husband will convey, usually put refusal largely upon the ground that to do so would be to coerce the wife, but we have seen that the rule that specific performance will be decreed upon some terms is almost universal, and that some of these terms are exceedingly harsh, e. g., the retention as indemnity of one-third of the purchase price till the wife dies or conveys.

Back of all of the few cases which neither decree diminution of purchase price nor provide for an indemnity to cover inchoate but contingent dower, lies the idea that specific performance is a matter resting in the judicial discretion of the chancellor, which discretion will not be exercised, if the exercise thereof shall be beset with difficulties or shall afford opportunity of injustice, such as may happen in dealing with the wholly contingent dower of a wife in the lands of a living husband. When these few cases, which neither indemnify the purchaser nor diminish the purchase

price by reason of the inchoate dower of the wife, decree specific performance, it is done in a sense *ex gratia*, that is, the plaintiff is told in effect that he may not have that for which he sues, but if he be willing to take less than he sued for and less than the option giver contracted to sell, he may have a partial specific performance. If he will not accept this half-loaf of justice, he must then take nothing by his solemn contract.

If a decree is to be made and plaintiff is to be relegated to his action for damages on the covenants in his deed, or to a breach of a contract to convey a title free and clear of defects, what becomes of a case like this where no warranty deed is to be made, or has been agreed to be made, but where we are compelled to reach the view that a fee is agreed to be conveyed merely by the implication arising from the agreement to sell? Can plaintiff after suing in equity for and accepting that title only which defendant's sole deed will convey, absent any covenant of warranty, afterwards sue at law for damages for defendant's failure to convey a title free of Mrs. Ridge's inchoate claim of dower? We are not in this case called on to answer this question, but if the answer happen to be that absent an agreement by defendant to convey by warranty deed, then absent the right to sue at law for damages for breach of the accepted option to buy, it would result in a large loss to plaintiff and a correspondingly large reward to defendant's wife for defendant's breach of faith and contract. It would be bad policy to announce a rule of law which would result in rewarding those who wantonly break their solemn obligations.

By compelling the husband to convey at a price diminished by the present value of the wife's inchoate dower, she personally and presently loses nothing; her husband suffers a loss which somewhat like bread upon the waters may come back to the wife. If it be con-

ceded that she is coerced by her husband's present loss to an extent greater than she is buoyed up by the future hope of widowhood and dower in the land, there is no sufficient basis or reason in the view to account logically for the rule. For if she sign rather than refuse to do so, the full purchase price is paid to her spouse, and if—and this contingency must occur to aid her in either case supposed—her husband be gathered to his fathers before her, she takes her statutory interest in the money, to-wit, personal property, of her husband rather than in the land, subject only to her husband's debts. [Secs. 349 and 351, R. S. 1909.] So that upon such view the case largely falls into the category of those things "which are six of one and half a dozen of the other."

Other reasons might be urged, but the same thing has already been written and the whole matter so ably discussed as that for me to try to add anything of value to the argument and learning would be but to be presumptuous without being illuminating. I am led by the authorities to conclude that the case of *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, should no longer be followed, but that the views expressed in the dissenting opinion should be followed as being more in consonance with the reason of things and more in accord with the great weight of authority. To the cases discussed in that dissenting opinion and to the reasoning there, I refer the student who is desirous of pursuing the matter further, without taking the time and space here to reason the matter out again, even if I were able, as I am not, to add one jot or tittle of argument thereto.

It results therefore that this case should be reversed and remanded with directions to the trial court to order specific performance in favor of plaintiff, and that if within a reasonable time to be fixed by the court, defendant and his wife do not make, execute, acknowledge and deliver to plaintiff a good and suffi-

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Tebau v. Ridge.

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cient deed of conveyance covering the premises in controversy to plaintiff, the circuit court shall enter a decree divesting out of defendant Thomas S. Ridge all and singular the right, title, interest and estate of him, said Ridge, in the land in controversy, and vesting the same in the plaintiff, upon the payment to defendant by plaintiff of the sum of \$68,200, diminished by the value as of the time of the trial, of the inchoate contingent dower of Mrs. Effie S. Ridge in the one-third part thereof, calculated at six per cent upon the basis of a life in the contingent dowress of two years, nine months and six days more than that of defendant, and being therefore the sum of \$2863, and leaving to be paid to defendant the sum of \$65,337. [Gianque and McClure's Tables, pp. 18, 20 and 158.] Taxes and special assessments, if any, since suit was begun to be paid by plaintiff; all costs to follow decree. It is so ordered.

Since, however, some of the views expressed in this opinion by FARIS, J., in which WALKER, P. J., and BROWN, J., concur, are in conflict with the opinion of a majority of the Court in Banc in the case of Aiple-Hemmelmann Real Estate Company v. Louis Spelbrink, 211 Mo. 671, and for the purpose of securing a single, certain, clear and authoritative utterance of the whole court on the question of whether there should be a diminution of the purchase price in specific performance on account of outstanding inchoate dower, we are of the opinion that this case, pursuant to authority conferred on this division by the Constitution, should be transferred to Banc to be there ruled on by all the brethren; which is accordingly ordered. All concur.

PER CURIAM.—The above cause coming into Banc, is reargued and submitted there with the result that the divisional opinion of *Faris, J.*, is adopted by the court. *Lamm, C. J.*, and *Graves, Brown* and



*Walker, J.J.*, concur; *Bond, J.*, dissents; *Woodson, J.*, dissents for reasons given in the principal opinion in *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671.

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THE STATE ex inf. THOMAS B. HARVEY, Circuit  
Attorney, v. MISSOURI ATHLETIC CLUB and  
ST. LOUIS CLUB.

In Banc, November 17, 1914.

1. **INTOXICATING LIQUORS: Sale: Interpretation of Statutes.** Laws relating to the sale of intoxicating liquors ought to be so construed as to carry out the true purpose of their enactment, and in accomplishing this purpose they should be liberally construed. While the statute should not be enlarged, it should be interpreted, where its language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained.
2. **SALE: Necessary Elements.** The sale of personal property is a transfer of the absolute or general property in the thing for a price in money. To constitute a valid sale there must be a concurrence of certain essential elements: First, parties capable of contracting, a seller and a buyer, either of whom may be an artificial person having a legal existence or a natural person, and, although such natural person may buy from said artificial person and be enabled to so buy only because he is a member thereof, yet he is still a natural person, because he has no such individualized ownership in the concrete property of the corporation as will enable him to legally appropriate it except by purchase; second, mutual consent, that is, a power and a purpose to sell by the seller, and a willingness to buy on the part of the purchaser; third, a thing being sold, the absolute or general property in which is capable of being transferred and is transferred from the seller to the buyer; and, fourth, a price paid or promised for such thing.
3. **———: Intoxicating Liquors: By Club to Members.** The supply of intoxicating liquors by an incorporated club to its members, within the club building, for a definite price to be paid, is a sale of such liquors, although the club does not sell to any one except members, and does not permit them

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State ex inf. v. Missouri Athletic and St. Louis Clubs.

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to pay for same at the time they are ordered or used, but requires the members to sign cards at the time the liquors are received, acknowledging the receipt and stating the price, and to pay for same at the end of the month when all supplies are paid for, and the money is commingled with other funds of the club and used in replenishing its stock of liquors and purchasing other supplies for the use of members. Nor is such transaction rendered any the less a sale by the fact that the liquor is supplied only to members of the corporation, since the corporation or club is one person, and no member or stockholder has any such individualized interest therein as authorizes him to appropriate any part of its assets without paying for them.

4. ———: ———: ———: Corporation. An incorporated social club is a person within the meaning of the corporation laws, and the dispensing of liquors by it to its members for agreed sums of money, although not for profit, is a sale. [To that extent overruling *Bell v. St. Louis Club*, 125 Mo. 308.]
5. ———: ———: ———: No License: Statute. In view of the statute (Sec. 7188, R. S. 1909) declaring that "no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop-keeper," it is unlawful for an incorporated social or athletic club, without first obtaining a license as a dramshop-keeper, to dispense liquors to its members at a price paid or to be paid, whether for profit or otherwise.
6. ———: ———: Corporation: Implied Powers. Legislative grants of powers to corporations only include such rights and powers as are clearly comprehended within the words of the act creating them or as may be derived therefrom by necessary implication, regard being had to the objects of the grant, and if ambiguities or doubts arise out of the terms used in the statute they must be resolved in favor of the public; and even though it be admitted (which would seem to be judicial legislation) that social clubs may be incorporated under the statutes providing for the incorporation of benevolent, religious, scientific, educational and miscellaneous associations, those statutes cannot be held to imply that an incorporated social club can sell liquors to its members, because the sale of intoxicating liquor is a limited privilege, and an express statute says that "no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop-keeper," and that such a license can be granted only to "a law-abiding, assessed tax-paying male citizen over twenty-

one years of age," and, hence, such a license cannot be granted to a corporation, since it lacks three of the essential elements, namely, age, character and sex, and hence the doctrine of implied powers is wholly inapplicable to this class of corporations when the question arises as to their right to sell such liquors.

7. ———: ———: ———: ———: **Former Construction of Statute.** A judicial construction of the statutes by the highest court of the State to the effect that a corporation possessed certain implied powers becomes a part of such statutes only in case such construction affects contract or property rights. The right to sell intoxicating liquor is a mere privilege or governmental grant, and does not involve either contract or property rights, hence, the former holding of the Supreme Court, in *Bell v. St. Louis Club*, 125 Mo. 308, that the dispensing of liquor at retail by a social club to its members was not a violation of the dramshop law, cannot be held to have conferred on said club a vested right to continue such sale.
8. ———: ———: ———: ———: **Legislative Inaction.** Long legislative inaction after a court has placed an interpretation on a criminal statute favorable to defendant does not estop the State from enforcing it, nor can it be allowed to defeat its manifest purpose.

### *Quo Warranto.*

#### OUSTER ENTERED AND SUSPENDED.

*Thomas B. Harvey* and *Richard P. Spencer* for informant.

(1) The sale of intoxicating liquors is immoral and illegal. (a) The tendency of the sale of intoxicating liquors is to deprave public morals, and its sale is therefore illegal. Its sale is "*malum prohibitum*" if indeed it is not "*malum in se*." *Austin v. State*, 10 Mo. 591; *State ex rel. v. Hudson*, 78 Mo. 302; *State ex rel. v. Moore*, 84 Mo. App. 18; *State v. Davis*, 108 Mo. 670. (b) There is no such thing as a natural right to sell or dispense intoxicating liquors. It is a restricted privilege granted by the State to a certain class of natural persons. *State v. Bixam*, 162 Mo. 21. (c) In this State traffic in intoxicating liquors is dif-

ferentiated from all other occupations and separated from natural rights, privileges and immunities, and is not considered a lawful business except as authorized by express legislation. *State v. Distilling Co.*, 236 Mo. 255; *Crowley v. Christensen*, 137 U. S. 91. (2) An incorporated club is not a "person" within the meaning of Sec. 7191, R. S. 1909, and cannot with or without a license sell intoxicating liquors. A dramshop keeper must be a law-abiding, assessed, tax-paying male citizen above the age of twenty-one years. R. S. 1909, sec. 7191; *State ex rel. v. County Court*, 66 Mo. App. 96; *State ex rel. v. Payne*, 107 Mo. App. 213; *State ex rel. v. Scott*, 96 Mo. App. 620. (3) Respondent has no express authority to traffic in intoxicating liquors. (a) Corporations are mere creatures of the law. They cannot exercise any power or authority, other than those expressly given by their charters or necessarily incident to the power and authority thus granted. They must act strictly within the scope of the powers thus conferred upon them. *Millinery Co. v. Trust Co.*, 251 Mo. 575; *Blair v. Perpetual Ins. Co.*, 10 Mo. 564; *Mathews v. Skinker*, 62 Mo. 329; *Carroll v. Campbell*, 108 Mo. 559; *State ex rel. v. Murphy*, 130 Mo. 24; *State ex rel. v. Orear*, 144 Mo. 157; *State ex rel. v. Trust Co.*, 144 Mo. 586; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Police Relief Assn. v. Tierney*, 116 Mo. App. 460; *Gould v. Fuller*, 79 Minn. 414. (b) The implied powers of a corporation must result from the charter by necessary implication, regard being had to the object and purpose of the corporation; and if there is uncertainty or doubt as to the terms of the charter, it must be resolved in favor of the public. *State v. Trust Co.*, 144 Mo. 586; *Millinery Co. v. Trust Co.*, 251 Mo. 575. (4) Respondent cannot have implied authority to traffic in intoxicating liquors. (a) The words of the statute under which respondent was chartered expressly forbid the exercise of any power which does not tend to the public advan-

tage. Sec. 3435, R. S. 1909; State ex inf. v. Rod and Gun Club, 121 Mo. App. 372. (b) The sale of intoxicating liquors being an unlawful and immoral occupation, the power to engage therein cannot be implied as necessarily incident to the powers granted an educational corporation. On the contrary, the charter of every corporation in this State is a contract with the State that it will not engage in the doing or carrying on of any business which is unlawful or immoral. State ex rel. v. Jockey Club, 200 Mo. 51; State ex inf. v. Standard Oil Co., 218 Mo. 350. (5) Respondent's method of dispensing intoxicating liquors constitutes a sale. (a) In State ex rel. v. St. Louis Club, 125 Mo. 308, the bona-fide social clubs were exempted from the operations of the dramshop law on the theory that their method of dispensing intoxicating liquors was not a sale and that the members thereof bought and drank their own liquors. State ex rel. v. St. Louis Club, 125 Mo. 330. (b) It was conceded by the court that the method whereby the liquors were dispensed to its members as set out in the agreed statement of facts in that case did amount, technically, to a sale for some purposes (l. c. 320) but it was declared by the court that it was not such a sale as would bring it within the meaning of the dramshop act. The language of the Dramshop Act is such as to include within its meaning all sales made "directly or indirectly." R. S. 1909, sec. 7186. (c) Section 5781 makes an exception of sales made by druggists under certain conditions. Sections 7220 and 7221 make other exceptions in express terms. The doctrine of *expressio unius est exclusio alterius* applies with full force to such an act. State v. Rawlings, 232 Mo. 558; Taylor v. Pullen, 152 Mo. 438; Bank v. Graham, 147 Mo. 257; Kansas City v. Building & Loan Assn., 145 Mo. 53; Mathews v. Skinker, 62 Mo. 334. (d) Though always cited, the opinion in the St. Louis Club case as to the nature of the transaction whereby an incorporated club serves liquors to its

members and their guests at a stipulated price per drink, has been condemned in every well considered opinion handed down by our State and Federal courts, wherein the precise question was presented for adjudication, and such transactions are almost uniformly held to be in violation of the dramshop acts of the several States and of the United States. *County of Ada v. Commercial Club*, 20 Idaho, 421; *Manning v. Canon City*, 45 Colo. 571; *Spokane v. Baughman*, 54 Wash. 315; *State ex rel. v. Minnesota Club*, 106 Minn. 515; *South Shore Country Club v. People*, 228 Ill. 75; *People v. Law & Order Club*, 203 Ill. 127; *State v. Social Club*, 73 Md. 97; *Conococheague Club v. Maryland*, 116 Md. 317; *Beauvoir Club v. State*, 148 Ala. 643; *Marmount v. State*, 48 Ind. 21; *Mohrman v. State*, 105 Ga. 709; *Army & Navy Club v. District of Columbia*, 8 D. C. App. 544; *Ky. Club v. Louisville*, 92 Ky. 309; *State v. Boston Club*, 45 L. R. A. 485; *State ex rel. v. Topeka Club*, 82 Kan. 756; *State v. Neis*, 108 N. C. 787; *United States v. Gillen*, 54 Fed. 656; *United States v. Alexis Club*, 98 Fed. 725; *Central Law Journal*, vol. 64, p. 482; *State v. Mudie*, 44 S. D. 41; *King v. Simmonds*, 44 Nova Scotia, 110; *Bachelors' Club v. Woodburn*, 60 Ore. 331. (e) In those cases where the St. Louis Club case is followed and approved, the courts, in order to justify their rulings, have resorted to artificial and fictitious reasoning. *Klein v. Livingstone Club*, 177 Pa. 224; *Cuzner v. California Club*, 155 Cal. 303; *Moriarity v. State*, 122 Tenn. 440; *State v. Colonial Club*, 154 N. C. 177; *Adams v. State*, 145 S. W. 940. (6) The opinion in the former St. Louis Club case should not be followed. (a) The facts in the agreed statement filed in this case are substantially different from those agreed upon in the old St. Louis Club case, but even if the parties and the facts were the same, this court will not follow its prior decision if the law therein be erroneous. *State ex rel. v. Blair*, 245 Mo. 691; *Winninghaus v. Trueblood*, 149 Mo. 583;

Young v. Downey, 150 Mo. 331; State ex rel. v. Gordon, 231 Mo. 568. (b) Especially is this true when, under such erroneous decision, no complications might arise concerning property rights. State v. Hhl, 47 Neb. 539; State v. Savage, 64 Neb. 705. (c) Nor is the court bound by prior decisions on points which should have been but were not considered. Moinet v. Burnham, 143 Mich. 489; Atwood v. Mayor, 144 Mich. 682; Cosgrove v. Wayne County Judge, 144 Mich. 682; Larson v. Bank, 66 Neb. 595. (d) The matters in dispute are not the same. Drainage District v. Tourney, 235 Mo. 80. (e) In the sense that one action may bar the other, the parties are not the same. State ex rel. v. McSpadden, 137 Mo. 628.

*E. T. & C. B. Allen* and *William C. Connett* for respondent Missouri Athletic Club; *A. & J. F. Lee* for respondent St. Louis Club.

(1) The distribution of liquors to members by a bona-fide social club is not a sale within the meaning of the Dramshop Law. State ex rel. v. St. Louis Club, 125 Mo. 308; State v. Myers, 162 S. W. 768; State v. Rose Hill Pastime A. Club, 121 Mo. App. 81; People v. Adelphi Club, 149 N. Y. 5; Klein v. Livingston Club, 177 Pa. St. 224; Cuzner v. California Club, 20 L. R. A. (N. S.) 1095; Moriarity v. State, 25 L. R. A. (N. S.) 1252; State v. Duke, 137 S. W. (Tex.) 654; Manassas Club v. Mobile, 121 Ala. 561; Adams v. State, 145 S. W. (Tex.) 940; State v. Fitzpatrick, 131 La. 1079, 43 L. R. A. (N. S.) 608; State v. University Club, 44 L. R. A. (N. S.) 1028; State v. Austin Club, 89 Tex. 20; Tennessee Club v. Dwyer, 11 Lea, 452; Piedmont Club v. Com., 87 Va. 540; Barden v. Montana Club, 10 Mont. 330; State v. Boston Club, 45 La. Ann. 585; State ex rel. v. McMaster, 35 S. C. 1; Seim v. State, 55 Md. 566. (3) The following considerations distinguished the cases below from the St. Louis Club case: (a) The

distribution of liquors to its members, by a bona-fide social club, where prohibitory or local option laws prevail, has been held to violate such laws. *State v. Robinson*, 163 Mo. App. 221; *State v. Literary Club*, 73 Md. 97; *State v. Horacek*, 41 Kan. 87; *State v. Lockyear*, 95 N. C. 633; *State v. Neis*, 108 N. C. 787; *State v. Topeka Club*, 82 Kan. 756; *State v. Kline*, 93 Pac. (Ore.) 237. (b) Where the club was a mere sham and a cloak for the retail liquor business, such distribution of liquor was held to be unlawful. *State v. Pastime Club*, 121 Mo. App. 81; *State v. Mercer*, 32 Iowa, 405; *Rickart v. People*, 79 Ill. 85; *Com. v. Ewig*, 145 Mass. 119; *Sothman v. State*, 66 Neb. 302; *Labor Club v. People*, 121 Pac. (Colo.) 120; *State v. Kelsey*, 83 Conn. 717; *State v. Calhoun*, 67 W. Va. 666; *Russell v. State*, 116 Pac. 451. (c) Special provisions in terms including "club" and "club-house" have been held to show an intent to include them. *Army & Navy Club v. Dist. of Col.*, 8 App. D. C. 544; *Kentucky Club v. Louisville*, 92 Ky. 309; *State v. Maryland Club*, 66 Atl. 667; *Com. v. Tierney*, 148 Pa. 552; *State v. City Club*, 83 S. C. 509. (d) The following cases construed revenue measures: *People v. Soule*, 74 Mich. 252; *South Shore Country Club v. People*, 228 Ill. 75; *State v. Essex Club*, 53 N. J. L. 99; *State v. Shumake*, 44 W. Va. 490; *United States v. Alexis Club*, 98 Fed. 725. (e) The following cases, after holding that the word "person" under their dramshop law, included a corporation, decided that a bona-fide club was within their law: *Ada County v. Boise Club*, 20 Idaho, 421; *State v. Minnesota Club*, 106 Minn. 515; *People v. Soule*, 74 Mich. 252. (3) To overrule the *St. Louis Club* case and then declare acts committed before the decision in the present case unlawful, which, under the *St. Louis Club* case, were lawful at the time they occurred, would violate the crudest notions of justice. *Ex post facto* law by judicial construction is as pernicious as *ex post facto* legislation. *People v. Tompkins*, 186 N. Y. 413;



Railroad v. Fowler, 142 Mo. 687; Erbaugh v. United States, 173 Fed. 435; Martin v. United States, 168 Fed. 202; Grubbs v. State, 24 Ind. 295. (4) The Legislature, when it passed the Act of 1891, is presumed to have been familiar with the fact that clubs wherein liquor was furnished had been in existence in the large towns and cities of this State for years. If such clubs tended to disorder or bad morals, the Legislature knew it. This distinctive, open, notorious, long use of liquor was well known to the Legislature, and if they had intended to regulate that use they would easily have found appropriate language in which to express that purpose. By failing to do so they indicated their purpose not to interfere therewith. State ex rel. v. St. Louis Club, 125 Mo. 308; State ex rel. v. Fitzpatrick, 131 La. Ann. 1079, 43 L. R. A. (N. S.) 608; Klien v. Livingston Club, 177 Pa. 224; People v. Adelphi Club, 149 N. Y. 5; Cuzner v. California, 20 L. R. A. (N. S.) 1095. (5) The official construction of this act for generations was that it did not apply to bona-fide social clubs, and is controlling. United States v. Hermanos & Co., 209 U. S. 337; Timmonds v. Kennish, 244 Mo. 328. (6) The Legislature of this State has convened in ten regular sessions since the decision in the St. Louis Club case was handed down. If the construction there given to this statute was not the one intended by the legislative department it will be presumed that the statute would have been so amended as to make effective the purpose of the Legislature in the enactment of these laws, and would have made amenable thereto bona-fide social clubs. McChesney v. Hager, 104 S. W. (Ky.) 715; Railroad v. Railroad, 138 Mo. 597; Strottman v. Railroad, 211 Mo. 255. (7) Since the St. Louis Club decision was published in the official reports of this court there have been two revisions of our statutes and the sections under consideration were continued and re-enacted in each revision. The court will presume that the Legislature

adopted the construction theretofore given the law by this court. *Handlin v. Morgan Co.*, 57 Mo. 116; *Camp v. Railroad*, 94 Mo. App. 281; *Sanders v. Anchor Line*, 97 Mo. 30; *Ex parte Durbin*, 102 Mo. 103; *Schawacker v. McLaughlin*, 139 Mo. 341; *State v. Hamme*, 168 Mo. 194; *State v. Schenk*, 238 Mo. 458. (8) Further evidence of that intention is furnished by the fact that since such decision of this court, the Legislature has repeatedly defeated bills which were introduced for the specific purpose of including bona-fide clubs within the Dramshop Law. *Easton v. Court-right*, 84 Mo. 36. (9) The circuit attorney is estopped by the solemn declarations of the courts and the Legislature of this State, and by the laches of its executive officers for a period of ten years, from now seeking the forfeiture of the charter of this respondent for its alleged violation of this law. *State ex inf. v. Trust Co.*, 144 Mo. 562; *State ex rel. v. Mansfield*, 99 Mo. App. 146; *State ex rel. v. Westport*, 116 Mo. 582; *State ex rel. v. Small*, 131 Mo. App. 470; *State ex rel. v. Huff*, 105 Mo. App. 354; *State ex rel. v. Water Co.*, 92 Wis. 496; *Com. ex rel. v. Bala & B. M. Turnp. Co.*, 153 Pa. 47; *Com. v. Railroad*, 10 Pa. Co. Ct. 129; *State v. Bailey*, 19 Ind. 453; *People v. Williamsburg Turnp. Co.*, 47 N. Y. 586; *People ex rel. v. Bank*, 1 Doug. (Mich.) 282.

WALKER, J.—The circuit attorney of the city of St. Louis has instituted two original proceedings in this court in the nature of *quo warranto* for the purpose of forfeiting the charters of two corporations, the St. Louis Club, and the Missouri Athletic Club, because of their alleged misuse and abuse of their respective franchises in having sold, without licenses as dramshop-keepers, intoxicating liquors, and in having violated section 7226, Revised Statutes 1909, in receiving, storing, keeping or delivering as agents or otherwise.

of any other person, intoxicating liquors without having licenses as dramshop-keepers.

The material issues in these cases being identical, varying only as to the manner in which the defenses are presented by counsel in each of the cases, they will be considered together.

These clubs were incorporated at different dates under what is now article 10 of chapter 33, Revised Statutes 1909, the statute authorizing the incorporation of benevolent, religious, scientific, educational and miscellaneous associations. This statute has not undergone any material change through legislation since the incorporation of these clubs; incidentally, its latitude, measured by judicial interpretation, may not inappropriately be likened to that virtue which is figuratively said to cover a multitude of sins. [1 Peter, iv, 8.]

No useful purpose will be served by setting out the pleadings at length. The informations formally charge the respondents with the abuse and misuse of their corporate powers in reference to the matters above stated, and ask a forfeiture of their charters. Their returns confess and avoid as to the charge of selling intoxicating liquors without license; and as to the alleged violation of section 7226, Revised Statutes 1909, that it is invalid, as being unconstitutional. The build-ings, appointments, conditions of membership, privileges, government and exclusive restrictions of each club are set forth at length and with particularity. It is pleaded that the matter of the right of these clubs to sell liquor without license has been adjudicated by this court in *State ex rel. Bell v. St. Louis Club*, 125 Mo. 308, and that the right under this decision has uninterruptedly been exercised by them since the rendition of the opinion in that case in 1894; that efforts have been made at successive sessions of the General Assembly to effect changes in the dramshop law which would require social clubs to take out dramshop licenses, and the failure or refusal of the Legislature to

enact laws of this character is a construction of the dramshop law by the State, represented by its officials, authorizing sales of liquor without license by such clubs. Whereupon, respondents plead that such failure or refusal on the part of the lawmaking power operates as an estoppel upon relator from claiming that the dramshop law applies to bona-fide social clubs; that respondents, relying upon the fact that they have never heretofore been molested in the sale of liquors without license, or in the violation of section 7226, *supra*, have expended large sums of money in furnishing and equipping their club houses, and that relator, by reason of the nonaction of the Legislature and the failure of the law officers to proceed against them for years after respondents had organized and were in operation as social clubs, should not be heard to complain against them.

Relator's reply in each case is a general denial, and in addition in one it is alleged that the suit pleaded in abatement by respondents (*State ex rel. Bell v. St. Louis Club, supra*) was brought by an unauthorized person and the proceedings therein were void, and that the facts in that and the instant cases are not identical, and that section 7226, *supra*, had not been enacted when the *Bell* case was determined.

Agreed statements of facts detail the character of each club as a social organization, the nature and amount of its expenditures, including the expenditures for intoxicating liquors; the nature and amount of income, including that charged to members and their non-resident guests for intoxicating liquors; the manner in which the club is governed, and numerous other matters not necessary to be set out here. As to the dispensing of liquors, practically the same plan is pursued in each club. If a member desires liquor he orders same and it is served to him in the club; on receiving it he signs a card acknowledging the receipt of same and stating the price; he makes payment for

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same within a stated time thereafter. Stress is laid in each statement upon the member receiving the liquor and not paying for it at the time, and that he is not permitted, under the rules, to pay for the liquor when received, but subsequently when he pays for his supplies for the month, and as a part of such supplies; that the same prices are charged members for liquors as are required to be paid at licensed cafes and dram-shops for like goods; that the money received by respondents for liquors is mingled with the other funds and used in replenishing the stock of liquors and in purchasing other supplies; that no profit has ever been made by these clubs or paid to members. A complete statement of each club's entire accounts for the preceding year accompanies the recital of the agreed facts.

The questions confronting us are so interrelated that their discussion, with probably some prolixity, becomes necessary to a determination of the issues involved.

I. It is scarcely worth while at this day and time to consume space discussing the character of the liquor traffic, except to say that early in our judicial history Judge NAPTON, who may well be styled the Story of our jurisprudence, said, in *Austin v. State*, 10 Mo. 591, that "the sale of intoxicating liquors is by law illegal and is not a privilege of a citizen of this or any other State, and that the right to sell same can only be acquired by complying with the law." Thirty-five years later, with no adverse intimation in the interim, this court reiterated the doctrine announced in the *Austin* case, *supra*, and in a *per curiam* opinion in *State ex rel. v. Hudson*, 78 Mo. 302, said, in addition, that "the license fee exacted of dramshop keepers is not a tax, but a price paid for the privilege of carrying on a business detrimental to public morals, and which the Legislature in the exer-

Sale:  
Intoxicating  
Liquors by  
Incorporated  
Club to  
Members.

cise of its police power has the right to prohibit altogether." And BURGESS, J., in *State v. Seebold*, 192 Mo. l. c. 727, said: "It is fundamental that no one has a natural right to sell intoxicating liquor, because the tendency of its use is to deprave public morals, and to do so without a license from proper authority is unlawful." (Citing cases.) So it was held in *Higgins v. Talty*, 157 Mo. 280, that a dramshop license was a mere permit, not a contract, between the State and the licensee, in which the latter has no vested rights, but is subject at all times to the police power and is revocable at any time the State may see proper to do so for any violation of the dramshop law, whether the license so provides or not.

Other opinions of this court and the courts of appeals add such force to the doctrine announced as repetition and unvarying adherence give to any judicial declaration. The last word on the subject has been so aptly said by WOODSON, J., speaking for this court, in *State v. Parker Dist. Co.*, 236 Mo. l. c. 255, that it may be appropriately incorporated here as follows:

"The authorities also establish the fact that the liquor traffic is not a lawful business, except as authorized by express legislation of the State; that no person has the natural or inherent right to engage therein; that the liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations. It is placed under the ban of the law, and it is thereby differentiated from all other occupations, and is thereby separated or removed from the natural rights, privileges and immunities of the citizen.

"The foregoing enunciations of the courts are based upon the well known fact that intoxicating liquors and the traffic therein, have brought intemperance, poverty and misery upon many of our citizens, and have been a fruitful source of crime on every hand."

These observations and conclusions are quoted, not as the great Cham of literature said, "to point a moral," but to throw light upon the view askance which has been taken by our courts of the traffic in intoxicants, and as a guide in determining what constitutes a sale of liquor within the meaning of the law. The statute relative thereto reads that: "No person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop keeper." [Sec. 7188, R. S. 1909.] Incidentally it may be said in this connection, that while the statute, of which this section is a part, prescribes a penalty for its violation, and that penal statutes are, as a general rule, strictly construed, it has been held here and elsewhere that laws in regard to the sale of intoxicating liquors ought to be so construed as to carry out the true purpose of their enactment (*State v. Walker*, 221 Mo. l. c. 516, affirming 129 Mo. App. l. c. 374); and in accomplishing this purpose they should be liberally construed. [*Seattle v. Foster*, 47 Wash. 172; *Cox v. Burnham*, 120 Iowa, 43; *People ex rel. v. Craig*, 112 N. Y. Supp. 1142.] Probably the rule in regard to the construction of this class of statutes is best stated in a New York case, *Mead v. Stratton*, 87 N. Y. 493, in which it is said: "While a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained." In addition to the rule in this regard here and elsewhere, section 7222, Revised Statutes 1909, gives us a definite guide as to the construction to be given our dramshop law. Aided by this rule of interpretation, the solution of the question as to what constitutes a sale of intoxicating liquors ought not be a difficult matter. However, at the threshold of a consideration of this case, we are confronted with the ruling of this

court in *State ex rel. v. St. Louis Club*, 125 Mo. 308, in which it was held by Division Number Two that the sale of liquor by a bona-fide social club not incorporated for profit, to a member, is not a sale within the inhibition of the dramshop law. Of this seeming lion in the path, more anon. Irrespective of this ruling for the nonce, what is a sale within the meaning of the statute? Our own courts have defined a sale of personal property to be a transfer of the absolute or general property in a thing for a price in money. [*State v. Wingfield*, 115 Mo. l. c. 436; *Barrie v. United Rys. Co.*, 138 Mo. App. l. c. 653.] In acts prohibiting the sale of intoxicating liquors elsewhere the word "sale" has been construed in a comprehensive sense to include what is known as barter and exchange. [*James v. State*, 124 Ga. 72; *Howell v. State*, 124 Ga. 698; *Coulter v. Portland Trust Co.*, 20 Ore. 469.] Justice GRAY of the United States Supreme Court, in *Iowa v. McFarland*, 110 U. S. 471, 28 Fed. 198, said that "A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent;" and Benjamin in his admirable treatise has defined a sale by pointing out its prime essentials; to constitute a valid sale, there must, he says, be a concurrence of the following elements, viz: (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised therefor. [Benjamin on Sales, secs. 1, 2.] Without unduly extending this discussion, what elements necessary to a sale do we find in the instant case? First, there is present the parties, a seller and a buyer—the one an artificial entity, it is true, but having a legal existence, and capable of contracting; the other, a natural person, and although he is buying from the artificial person and is enabled to buy by reason of his membership or as a shareholder, he has no such individualized ownership in the con-



crete property of the corporation as will enable him to legally appropriate it except by purchase; second, we find here a power and a purpose to sell on the one part, and a willingness to buy on the other, thus constituting all the requisites of mutual consent; third, liquor, the thing being sold, is never absent from the exchange, and, being personal property, is capable of transfer from the seller to the buyer; and fourth, also ever present in the transaction, is the price agreed to be paid by the buyer when he signs the steward's slip, receives the liquor and agrees to pay for same when he settles for other supplies. In the face of the facts it seems to us that the citation of authorities is not necessary to convince the impartial mind that here are embraced all the essentials of a valid sale. But a litigant is entitled at the hands of a court to a dignified consideration of every serious contention; and, although it may, to some minds, seem finical and trifling with words to claim that a club member to whom liquor is delivered under the facts stated, is not a party to a sale, but is simply appropriating at his will a part of his own property, the contention is entitled to a review. Light is sometimes thrown on a matter under investigation by an interrogatory, and we, therefore, ask: If the buyer here is simply appropriating his own property, and the club is not selling same, why follow the farcical formality of keeping an account of each transaction and requiring the purchaser to pay for what he has received at agreed intervals? If we mistake not, although it may not be in the record, a condition of membership requires payment for all supplies received. The easier and the simpler plan, and one which would doubtless be pursued if the liquor dispensed was the common property of the members, would be for each individual to order as he willed, without the then useless procedure incident to an ordinary sale. But, as a matter of fact, the property of an incorporated company, regardless of the article of

the statute under which it is organized, is not held in common by the members or shareholders, but is owned by the artificial person which the law has permitted to be created, the prime purpose of whose creation is to enable it to contract and to hold property in some form for some purpose. This seems too elementary to waste words in its discussion. A few illustrations may, however, help to emphasize the unsoundness of this contention of respondents. Would it be seriously contended that a member of an incorporated religious organization could, at will, appropriate as his own the communion table or the vessels of the altar; or that a member of a library association could take as his own such books as suited his taste and as he deemed represented his interest in the institution; or that a shareholder in a manufacturing company could detach for his personal use such portions of the machinery as he willed to take; or that the owner of stock in a railroad company, or other carrier, upon its passing its dividends, as sometimes occurs, after a series of lean years and adverse legislation, could appropriate such portions of its portable property as he deemed sufficient to cover his investment? None the less absurd is the contention that a member of an incorporated social club, although he contracts to buy and does buy, is not consummating a sale with the club when liquor is delivered to him under the facts detailed, but is simply appropriating to himself his portion of the common property. If, therefore, the foregoing reasoning is sound, and the illustrations are applicable, we are justified in the conclusion that the legal essentials of a sale of liquor are the same as in the transfer of other personal property, save that liquor can only be sold under the limitations prescribed by the statute. This conclusion finds ample support in other jurisdictions where statutes are in force substantially identical with that of Missouri.

In Alabama a transaction whereby a bona-fide incorporated social club sells liquor to one of its members is held to be a sale within the meaning of the law prohibiting the sale of liquors without license. [Beauvoir Club v. State, 148 Ala. 643.]

In Colorado it is held that a social club which dispenses liquor to its members at a price fixed by its managers violates a local ordinance prohibiting the sale of such liquors, even though they are provided simply as an incident to the entertainment of the members, the transaction being held to be a sale. [Manning v. Canon City, 45 Colo. 571; Lloyd v. Canon City, 46 Colo. 195.]

In the District of Columbia a like ruling, under a similar state of facts, has been made, the court observing that it is immaterial for what purpose the club was formed, or whether the sale was made for profit or was but an incident to the cultivation of social relations between the members. [Army and Navy Club v. District of Columbia, 8 App. D. C. 544.]

In Georgia it is held that the admission only of members to club rooms, and the fact that the selling and drinking of intoxicating liquors, was only an incident and not the main object of the incorporation, will not make the place where the liquors are dispensed and drunk the less a tippling house within the meaning of a statute making penal "the keeping open of tippling houses on Sunday." [Mohrman v. State, 105 Ga. 709.]

In Illinois it is held to be immaterial that liquors are sold by a corporation club to its members for a price no more than sufficient to cover cost and service, or whether the organization is one in good faith or a mere subterfuge to evade the statute, as in either case the transaction is a sale within the meaning of the statute requiring a license. [People v. Law and Order Club, 203 Ill. 127, 62 L. R. A. 884.] A later Illinois case (South Shore Club v. People, 228 Ill. 75, 12 L.

R. A. (N. S.) 519, 119 Am. St. Rep. 417) is peculiarly appropriate in view of what we have said in regard to ownership. The court in that case said: "The liquor belonged to the corporation as a legal entity, and no member owns any share of the liquor as a tenant in common or otherwise. An association organized merely for social, literary, scientific or political purposes, although not incorporated, is not a partnership. A member of such an association has no individual right or interest in the property, and owns no proportionate share of it, but only has a right to the joint use so long as he continues to be a member. Even if they were tenants in common, a transfer of a specific part of the property to one for a stipulated price would be a sale."

In Maryland the law regulating the sales of liquors was held to apply to private clubs when liquor is sold to members, even without a profit. [Conoc. Club v. State, 116 Md. 317.]

In Michigan it is held that a law requiring that licenses should be obtained by retail liquor dealers and taxing the business of liquor selling, wherever found or by whom carried on, reaches a club house or private house, as well as a saloon or tavern, and includes all persons engaged in such business. [People v. Soule, 74 Mich. 250.]

In Minnesota, in a case which reviews a large number of authorities, it is held that a club or social organization chartered under the laws of the State, is a "person" within the meaning of the license laws, and that the dispensing of liquors by it to a member constitutes a sale in violation of law, unless protected by license. [State ex rel. v. Minnesota Club, 106 Minn. 515.]

The Supreme Court of Mississippi, in discussing a case involving the right of a social club to dispense liquor to its members, not for profit, but without license, said: "We unhesitatingly adopt as sound the views of those courts which have held that such a de-

vice as was resorted to by appellant in disposing of . . . liquor was a violation of the law against unlicensed retailing. . . . It must be so unless an association of persons may lawfully do what none of the individuals could, and it would be a reproach to the law if this were so." [Nogales Club v. State, 69 Miss. 218.]

In New Jersey a club which disposes of liquors to its members, not to evade the law or to make a profit, is held to be subject to an ordinance imposing a penalty for selling liquor without license. The court said: "It is wholly immaterial, and not a legitimate subject of inquiry, whether an intention to violate or evade the law was present or not. Intent constitutes no part of the offense; the simple question is presented, whether the act expressly inhibited has been done? If so, the presumption of wrongful intent is absolute and cannot be controverted." [Newark v. Essex Club, 53 N. J. L. 99.]

In Oregon the dispensing of liquors by a club to its members is held to be a sale. [State v. Kline, 50 Ore. 426; Bachelors' Club v. Woodburn, 60 Ore. 1. c. 341.]

In Washington it is held that the transaction is a sale under an ordinance forbidding the sale or disposal of liquors without license, the court saying in effect that liquors owned by a club and transferred to a buyer for a consideration is a sale, and it is immaterial that the buyer is a member and as such has an interest in the property. [Spokane v. Baughman, 54 Wash. 315.]

In West Virginia the disposal of liquors by a club to its members is within the statute requiring a license, the statute being held to be broad enough to permit no shift or device to defeat its purpose, no matter whether the club is social, literary or otherwise. [State v. Shumate, 44 W. Va. 490.]

*Contra.* In California (*Cuzner v. California Club*, 155 Cal. 303), Massachusetts (*Comm. v. Baker*, 152 Mass. 337; *Comm. v. Ewig*, 145 Mass. 119), Montana (*Barden v. Montana Club*, 10 Mont. 330), New York (*People v. Adelphi Club*, 149 N. Y. 5), Pennsylvania (*Klein v. Livingston Club*, 177 Pa. St. 224), South Carolina (*Columbia Club v. McMaster*, 35 S. C. 1), Tennessee (*Tennessee Club v. Dwyer*, 11 Lea, 452; *Moriarty v. State*, 122 Tenn. 440), Texas (*Finn v. State*, 38 Tex. Cr. 75), and in Virginia (*Piedmont Club v. Comm.*, 87 Va. 540) it is held, on the basis of the bona-fides of the clubs, as in *State ex rel. v. St. Louis Club*, *supra*, that the distribution of liquors only to members is not a sale within the meaning of the liquor laws.

In the foregoing we have, so far as possible, included for and against the right of sale only cases involving bona-fide social clubs in States not under prohibition or local option laws, and not those in which the clubs were expressly prohibited from selling. The cases discussed disclose a lack of harmony in regard to what constitutes a sale, the majority being, as above indicated, against the doctrine announced in the *St. Louis Club* case, *supra*, and others of like tenor. The contrariety of these opinions may be due, to some extent, to variant statutes or to differences in the facts. If this be true, it lessens their force, which with us is, at best, but persuasive, except as they support the conclusion reached in the *St. Louis Club* case. The conclusion in this case we do not regard as sound or consistent in not requiring a fair and uniform enforcement of the law in regard to the sale of intoxicating liquors; and in so far as it holds that an incorporated social club is not a person within the meaning of the law in regard to corporations, and that the dispensing of liquors by it to its members is not a sale, it is overruled.

II. The dispensing of liquors by social clubs to their members having been by reason and precedent

established as sales, under what authority can their dispensation be conducted in the absence of express authority therefor in the statute?

Respondents are corporations organized to advance, by social intercourse and athletic pursuits, the bodily and mental health of their members, and by friendly exchange of views and discussions to advance the commercial prosperity of the city of St. Louis, and to obtain a place for the common and friendly in-

**Corporations:  
Implied  
Powers.**

tercourse of such members with each other. So say their returns, supplemented by like declarations in the agreed statements of facts. That respondents have no express power to sell liquor is admitted unless it be claimed that the ruling in the St. Louis Club case operated to confer this power upon them as a species of judicial legislation; as we understand their contention, however, it is not so claimed, but that the construction given the dramshop law in that case simply emphasized an implied power which the clubs possessed, in the absence of an express prohibition. The doctrine of implied power as applied to corporations demands our attention. It will be recalled that Chief Justice MARSHALL said in the Dartmouth College case (4 Wheat. (U. S.) 518, 636) among other things that have become maxims, that "a corporation being the mere creature of the law possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence;" and the Supreme Court of Minnesota has held that the same rule is applicable to articles of incorporation which are analogous to a charter (Gould v. Fuller, 79 Minn. 414); so that by express judicial declaration the doctrine as to the limitation of the powers of a corporation within the instrument of its creation has been made to apply to every class of incorporated association, whether it be organized for business, moral, intellectual or benevolent purposes or to promote social

intercourse. Incidental powers, as the term is employed by Chief Justice MARSHALL, mean such as are directly and immediately appropriate to the execution of the powers expressly granted, and exist only to enable the corporation to carry out the purpose of its creation. [Hood v. Railroad, 22 Conn. 1; People v. Chicago Gas Trust Co., 130 Ill. 268; State ex rel. v. Newman, 51 La. Ann. 833.] Such powers are not invoked by respondent, however, and their discussion is superfluous. But the implied powers are of moment. They are defined to be those possessed by a corporation not indispensably necessary to carry into effect others expressly granted, and comprise all that are appropriate, convenient and suitable for that purpose, including, as an incidental right, a reasonable choice of the means to be employed in putting into practical effect this class of powers. Broad as this definition seems, and it is the resume of an exhaustive review of many cases by eminent text-writers, we find it nowhere more lucidly and comprehensively considered than by BURGESS, J., speaking for this court in State ex inf. Crow v. Lincoln Trust Co., 144 Mo. l. c. 583 et seq., where, after reviewing our own cases on this subject, as well as those of other jurisdictions, the substance of the court's conclusion is that it is a settled rule of construction that legislative grants of power to corporations, public or private, only include such rights and powers as are clearly comprehended within the words of the act of their creation or may be derived therefrom by necessary implication, regard being had to the objects of the grant; and if ambiguities or doubts arise, the terms used in the statute must be resolved in favor of the public; that if the powers conferred are expressly enumerated, this, under the maxim of *expressio unius, etc.*, implies the exclusion of others not enumerated. GRAVES, J., speaking for this court in Hanlon Mill. Co. v. Miss. Valley Trust Company, 251 Mo. l. c. 575, said, in substance: That a corporation pos-



sesses only such powers expressed in or that may be fairly implied from the statute of its creation; that powers enumerated imply the exclusion of all others; and that any doubt or ambiguity respecting the possession of any particular power arising out of the terms of the statute is to be resolved against its possession, or, as BURGESS, J., aptly said in the Lincoln Trust Co. case, *supra*, "It must be resolved in favor of the public."

The respondents were incorporated, as shown by the pleadings and the agreed statement of facts, under that article of the law of corporations of this State (Art. 10, chap. 33, R. S. 1909) providing for the formation of benevolent, religious, scientific, educational and miscellaneous associations. To the purist their incorporation under either of these classifications might seem to do violence to the usual and well accepted meaning of the words; but judicial interpretation, which can and oftentimes does accomplish what derivation and usage cannot, has declared in *State ex rel. v. Lesueur*, 99 Mo. 552, that a social club, organized as these were, is included in one of the classes named, or may be incorporated under said article 10 of chapter 33, *supra*. To this article, therefore, we must look for the express or implied powers possessed by respondents. Section 3435 of article 10 *supra*, defines the purposes for which associations may be incorporated under said article whose organization is clearly authorized thereunder and those purposes do not depend for their existence on judicial construction; but in the case of social clubs there is no declaration of express powers, their incorporation having been authorized by judicial interpretation resort must be had to that general knowledge necessarily possessed by the courts in common with individuals as to the nature and purpose of associations of this character to enable the full extent of their powers to be determined. Guided, therefore, by this knowledge, and the declara-

tions as to respondents' purposes in their articles of incorporation, it may reasonably be concluded that they are clothed with power to do whatever may be necessary, not only to their existence but to promote the prosperity of organizations of this character and the pleasure and improvement of the membership not contrary to public policy or in violation of the law. So extended is this field that a speculation of the powers included therein would be an impossibility. Respondents contend that the dispensing of intoxicating liquors is included; this, upon the theory—regardless of what may have been said in cases so holding—that alcohol in one or all of its many forms as a beverage is necessary for the promotion of social intercourse in that it tends, while loosening the reins of fancy, to strengthen the bonds of good-fellowship. Its use at the festal board, or after the heat of the combat or the jousts of the tourney, or when “two auld cronies meet again” or as a “wee deoch an doris” has been chronicled in history sacred and profane, and oftentimes told in story and in song. To say more would savor of pedantry. Despite all of this, and leaving out of consideration any discussion as to its moral or hygienic effect, as out of place in legal opinion, we find that the framers and interpreters of our law from the dawn of our jurisprudence, both here and elsewhere, have regarded liquor as an Ishmaelite among the products of man's ingenuity, and have placed its sale under the ban of carefully worded restrictions. It no sooner creeps out of the still, the wine press or the brewing vat than the exciseman demands tribute for its being; and before it can be vended taxes *ad valorem* and for the privilege of sale must be paid; but this is not all, upon leaving the warehouse of the wholesaler, the retailer, before dispensing it, must take out a license as a dramshop-keeper. [Sec. 7188, *supra*.] This is an individual privilege which can only be granted to “a law-abiding, assessed tax-paying male citizen over

twenty-one years of age" (Sec. 7191, R. S. 1909; State ex rel. v. County Court, 66 Mo. App. 1. c. 100; State ex rel. v. Page, 107 Mo. App. 1. c. 216); and it cannot be granted to a partnership (State ex rel. v. Scott, 96 Mo. App. 620), nor to a corporation, because the latter does not possess the requisites expressly required of an applicant, viz.: Age, character and sex—reaching its majority when its incorporation is effected, its age cannot be measured by years; being intangible it can have no character, and for a like reason more materially expressed, having no body to be kicked it is sexless. It, therefore, lacks three out of the four statutory requisites essential to a qualified applicant for a dramshop license.

By necessary and inevitable exclusion, therefore, it being impossible, under the law, for social clubs to procure licenses, and the sale of liquor being a limited privilege, no implied or other power exists authorizing corporations of this character to make sales. Further, an implied power in a corporation to do an unlawful act cannot exist; and if liquor be sold without license over a mahogany table, in glass of finest crystal, under a silken canopy in a palace, it is none the less a crime, under a fair and impartial interpretation of the law, than an unauthorized sale over a deal board in a hovel that would put "Shanahan's ould Shebeen" to shame.

The absence of express powers from the statute which has been held to authorize the incorporation of social clubs, under that portion of the law cited by respondents as giving color to an implied power to sell liquors, is wholly inapplicable to that class of associations. The supplemental clause of section 3435, *supra*, relied upon by respondents, after enumerating the specific classes that may be incorporated, provides (*italics are ours*) that "any association, society, company or organization which tends to the public advantage *in relation to any or several of the objects above enumerated, and whatever is incident to such objects,*

may be created a body corporate." The subjects of incorporation enumerated are, as we have seen, benevolence, religion, science, and education, and while it is nowhere expressly contended by respondents that social clubs partake of the nature of either of these classes, their incorporation having been authorized under the ruling in *State ex inf. v. Lesueur*, supra, it is reasoned by analogy that they may do whatever tends to the public advantage in relation to any of the objects above enumerated. This argument proceeds upon the covert assumption, which is carefully avoided in express terms, that a social club is organized for one of the purposes expressly mentioned, which it will require no argument to prove in the case of respondents to be a sophism, although the right to a charter was recognized in the *Lesueur* case upon the ground that the applicant for corporate existence possessed educational features. Incidentally, and as a mere *dictum*, so far as the instant cases are concerned, may not the ruling in the *Lesueur* case be properly limited to the incorporation only of such social clubs as are shown by their articles to possess some of the features characteristic of the classes named?

But we wander afield. To render respondents' contention applicable it must be further assumed that the sale of liquors, concretely stated, is related to either benevolence, religion, science or education, or that it is incident to one of such objects. A rather unusual relationship, to say the least, and if the sale of liquors is, as claimed, "an incident to the maintenance of the clubs," then as we have iterated and reiterated in the discussion of other phases of this question, they draw their substance, in part at least, from violations of the law.

III. Respondents contend that the statute in regard to the sale of intoxicating liquors having received judicial construction by the highest court in this

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Construction:  
Part of  
Statute.**

State, such construction became as much a part of the statute as if written into it at the time of its enactment.

As a general proposition, this is a correct statement of the rule (*State v. Hamey*, 168 Mo. l. c. 194; *Sanders v. St. L. & N. O. Anchor Line*, 97 Mo. l. c. 30; *Handlin v. Morgan Co.*, 57 Mo. l. c. 116), with this limitation, that the law as construed becomes a part of the original text only when such construction will not affect contract or property rights. [*Douglass v. County of Pike*, 101 U. S. l. c. 687; *Green v. Neal*, 6 Pet. l. c. 297; *Shelby v. Guy*, 11 Wheat. l. c. 368; *Farrior v. N. E. Mortgage Security Co*, 92 Ala. l. c. 179.] This limitation is a sufficient reason for the rule and attests its justice and wisdom. The case of *Railroad v. Fowler*, 142 Mo. l. c. 687, cited by respondent, is not at variance with this doctrine, because it declares that the construction there placed on the statute was in the protection of certain rights. The facts in the matter here involved are not parallel. While it was held in the *St. Louis Club* case, *supra*, that the dispensing of liquor at retail by the club was not a violation of the dramshop law, the right to sell under this permissive construction of the statute did not involve any contract or vested right—the sale of liquor being a mere privilege conveys no such right until the law regulating same has been complied with and a license granted, when the right to the enjoyment of the privilege assumes the nature of a contract which cannot be abrogated without sufficient cause. [*State v. Parker Distilling Co.*, 236 Mo. 219; *Higgins v. Talty*, 157 Mo. 280; *State ex rel. v. Baker*, 32 Mo. App. 98.] There is no claim that any contract rights are impaired, but that any interference with the uninterrupted operation of the dramshop law as construed in the *St. Louis club* case will, in respondents' own words, "violate the crudest notions of justice." This conclusion, like that of Hamlet in

his colloquy with Polonious in regard to the cloud (*Hamlet*, act 3, scene 2) is dependent wholly upon the vantage ground from which we view justice. If a social club, existing only by judicial interpretation, be entitled to rights and privileges not accorded to a natural person, and which the latter can acquire only under the limitations of a restrictive statute, then there may be some force in respondents' conclusion, otherwise not. While a proper regard should, at all times, be entertained for precedent when it does not violate principle, there should be no hesitancy in overruling one which, in our opinion, places a strained construction upon a plain statute and thereby works manifest injustice. Respondents' plaint, reduced to its simples, is that the St. Louis Club case should not be overruled, because thereunder respondents have enjoyed privileges not accorded to others. This view does not meet with our approval. Nor are we impressed with the soundness of the contention that because two decades or more of calendar time have elapsed since the rendition of the opinion in the St. Louis Club case, and no succeeding Legislature has sought to render the dramshop law more definite and inclusive, this perforce is a legislative construction which estops the relator in these proceedings. The general rule, without further encumbering this opinion with authorities, is that a practical construction placed upon a law by legislative acquiescence therein will not be lightly questioned, provided it is not allowed to defeat the manifest purpose of the statute—this last, we have endeavored to make clear, has been done by the judicial construction of the dramshop law under which respondents exercise the privilege they are now contending for. As to subsequent legislative action, none was necessary, because the statute is sufficient and only awaited enforcement to effect the purpose for which it was enacted.

In view of the foregoing we would be slow to intimate, much less declare, especially in view of the facts in the instant cases, that legislative inaction would suffice to estop relator from the enforcement of a criminal statute. Generally there is no limit to the power of a Legislature to enact laws regulating or prohibiting the sale of intoxicating liquors; neither the State nor the Federal Constitution attempts to narrow this discretion. And the action or inaction of one Legislature, while it may be persuasive, has no binding force upon a succeeding one, and, therefore, should not influence the courts in construing the law. [Boyd v. Alabama, 94 U. S. 645; Metro. Board of Excise v. Barrie, 34 N. Y. 657; Moore v. State, 48 Miss. 147.]

The foregoing sustains the contention of relator that respondents in the sale of intoxicating liquors have abused their corporate powers as social clubs, and any discussion as to the application or validity of section 7226, Revised Statutes 1909, is unnecessary.

In view of what has been said, we are of the opinion that each of said respondents, to-wit, the St. Louis Club and the Missouri Athletic Club, has in the sale of intoxicating liquors abused and misused the authority, franchises and privileges conferred upon them by law, and that judgments of forfeiture be entered herein dissolving each of said associations—the ousters to be suspended so long as said clubs in good faith desist from such sales. And it is so ordered. All concur, except *Graves, J.*, who concurs in first paragraph and the result.

**WILLIAM B. MAJOR et al. v. LELIA M. KIDD  
et al.; LELIA M. KIDD, and LELIA M. KIDD  
as Executrix of Last Will of BENJAMIN R.  
MAJOR, Appellants.**

**In Banc, November 17, 1914.**

1. **WILL CONTEST: Careful Consideration of Evidence.** Courts give careful consideration to the evidence in cases contesting the validity of wills, to the end that it may be seen that there is substantial testimony upon the issues of either mental incapacity or undue influence; and especially, to the testimony concerning incapacity, for the reason that opinions of lay witnesses often furnish the basis for the verdict.
2. ———: **Law Case.** A will contest is a trial of issues of law, and is governed by the rules of law applicable to legal actions.
3. ———: ———: **Incapacity: Substantial Evidence.** If there is substantial evidence tending to support the charge of testator's mental incapacity to make the will in contest, the verdict of the jury, the instructions being proper, is binding upon the appellate court.
4. ———: ———: ———: ———: **Contestants' Testimony.** If the evidence adduced by contestants upon the issue of testator's mental incapacity is substantial, the issue then becomes a matter for the jury, notwithstanding the contradictory proof produced by proponents.
5. ———: **Undue Protest of Mental Soundness.** Where the will states testator is "now in unusual strength of body and mind," that "I am now in the fuller enjoyment of all my faculties than for many years past" and that "the added years have not lessened my mental faculties," it earmarks itself with a question of his sanity.
6. ———: **Incapacity.** Evidence that testator in 1859, in robust health, both bodily and mentally, was the owner and manager of an exceedingly large farm; that within that year he became mentally unbalanced, and after three physicians had consulted upon his case, he was taken to an asylum for the insane, where he remained for more than a year; that from the day of his return to his death, in 1910, at the age of 93, he attended to none of the business upon that farm, but it was attended to wholly by his wife and brother; testimony of two doctors who had occasion to see and converse with him, and give it as their opinion that he was of unsound mind;



testimony of men and women who worked upon the farm, detailing facts which authorize them to express an opinion as lay witnesses and who testify that he was of unsound mind; and testimony of many neighbors, who knew him both before and after he became insane in 1859, and who testify that in their judgment he was of unsound mind during all the years from 1860 to the day of his death, is substantial evidence requiring the issue of his mental capacity to make a will in 1889 and to add a codicil in 1897, to be submitted to the jury.

7. ———: **Sound Mind: Burden of Proof.** The burden is upon the proponents of the will to show that testator was of sound mind. It is not error to instruct the jury that the burden rests upon the proponents to prove, by the greater weight of the credible evidence, that testator, at the time of making the will, possessed a sound disposing mind. The burden is not met by making out a prima-facie case, but remains upon proponents throughout the trial. [Following *Goodfellow v. Shannon*, 197 Mo. l. c. 278 *et seq.*, and reviewing all the cases.]
8. ———: ———: **Statute.** Because of the wording of the statute (Sec. 535, R. S. 1909) declaring that "every male person, twenty-one years of age and upward, of sound mind; may, by last will, devise all his estate," etc., the question of mental capacity of testator is in all will cases. The burden of proving the testator's mental capacity is by said statute placed upon the proponents, not only in the probate court, but in the circuit court, for a will contest is but the probating or rejection of the will.
9. ———: ———: **Ordinary Affairs: Capacity and Necessity of Heirs.** An instruction telling the jury that if testator did not have sufficient soundness of mind "to understand the ordinary affairs of life" he was incapacitated to make a will, is not erroneous.  
*Held*, by BROWN, J., that said instruction in requiring testator to understand the "capacity and necessity" of those who are the natural objects of his bounty, is erroneous, but as that part of the instruction is not relied upon by appellants it is not ground in this case for reversal.
10. ———: ———: **Adjudged Insane.** An instruction telling the jury "that under the law as it existed in 1859 and 1860, it was not required that a person be adjudged insane by any court or tribunal in order that he be placed in the insane asylum, but might be sent as a private patient upon the certificate of two physicians," even if technically erroneous, was harmless in this case, the facts being that testator was taken to an insane asylum in 1859 and remained there for over a year, and made his will in 1889, and the evidence of his incapacity being satisfactory.

Appeal from Pettis Circuit Court.—*Hon. Hopkins B. Shain*, Judge.

AFFIRMED.

*W. M. Williams, G. W. Barnett and Montgomery & Montgomery* for appellants.

(1) The court erred in refusing the peremptory instruction in the nature of a demurrer to the evidence asked by the defendants at the close of the entire testimony. There was no substantial evidence that, at the time of execution of the will and codicil in question, the testator did not have the requisite testamentary capacity. *Winn v. Grier*, 217 Mo. 420; *Gibony v. Foster*, 230 Mo. 106; *Sayer v. Princeton University*, 192 Mo. 95; *Cash v. Lust*, 142 Mo. 630; *Hughes v. Rader*, 183 Mo. 630; *Wood v. Carpenter*, 166 Mo. 465; *Cutler v. Zollinger*, 117 Mo. 92; *Archambault v. Blanchard*, 198 Mo. 384; *Riley v. Sherwood*, 144 Mo. 354; *Berberet v. Berberet*, 131 Mo. 399; *Defoe v. Defoe*, 144 Mo. 358; *McFadin v. Catron*, 138 Mo. 197; *Fulbright v. Perry County*, 145 Mo. 432; *Aylward v. Briggs*, 145 Mo. 604; *Crossan v. Crossan*, 169 Mo. 641.

(2) Peculiarities and eccentricities, weakened mental and physical condition caused by age or disease, imperfect memory, failure to transact ordinary business and non-recognition of friends or members of the family at times, are wholly insufficient to show want of testamentary capacity. *Gibony v. Foster*, 230 Mo. 131; *Sayer v. Princeton University*, 192 Mo. 95; *Winn v. Grier*, 217 Mo. 420; *Cash v. Lust*, 142 Mo. 630; *Archambault v. Blanchard*, 198 Mo. 384. (3) The court erred in giving the second instruction on behalf of the contestants because it places upon the proponents the burden of proof at the close of the whole case on the issue of mental capacity. The law pre-

sumes sanity and after the attesting witnesses have been examined, it devolves upon the contestants to establish incapacity by the greater weight of the evidence. *Jackson v. Hardin*, 83 Mo. 182; *Lindsey v. Stevens*, 229 Mo. 614; *Sehr v. Lindeman*, 153 Mo. 288; *Riggin v. College*, 160 Mo. 597; *Gibony v. Foster*, 230 Mo. 131. (a) "The evidence of the subscribing witnesses showed that the testator was of lawful age, and of sound mind, as well as the due execution of the will. This made a prima-facie case for the proponents." *Harris v. Hayes*, 53 Mo. 96. (b) "After the proponents had established the execution of the will and the sanity of the testator by the subscribing witnesses, the burden then of establishing incompetency of the testator shifted and it devolved upon the contestants to overcome the presumption of sanity by persuasive evidence." *Riggin v. Westminster College*, 160 Mo. 579; *Holton v. Cochran*, 208 Mo. 410; *Sehr v. Lindemann*, 153 Mo. 276; *Southworth v. Southworth*, 173 Mo. 59; *McFadin v. Catron*, 138 Mo. 197; *Fulbright v. Perry County*, 145 Mo. 432. (c) While some cases in this State hold to the contrary, the principle upon which the courts hold that the contestants have the burden of proof is well stated in 1 *Underhill on Wills*, sec. 86. *Garesche v. Boyce*, 8 Mo. 228. (4) The fifth instruction required, as a test of the capacity to make a will, ability on the testator's part to comprehend "the ordinary affairs of life." While this language is used *arguendo* in some cases, it is not proper in an instruction to a jury. It opens too wide a door for speculations and conjectures. (5) Contestants' third instruction was erroneous and extremely prejudicial to the proponents of the will. It singled out and directed special attention to the fact that the testator, thirty years before the will was made, was taken to the asylum at Fulton, and authorized the jury to infer without evidence to that effect that this was done upon the certificate of two physicians; and in

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connection with instruction 4, further authorized them to build upon this fact and presumption another presumption that he continued insane during the remainder of his life. (6) The court erred in giving instruction 4. It does not require the jury to find that the insanity referred to was of a permanent character, as a condition precedent to the presumption of its continuance. *Richardson v. Smart*, 152 Mo. 634, 65 Mo. App. 18; *Buford v. Gruber*, 223 Mo. 257; *State v. Lowe*, 93 Mo. 547; 22 Cyc. 1116, notes 23 and 24. (7) The will is fair, sensible and reasonable on its face. It makes no discrimination as to the children but names them all and gives them one dollar each. It then bequeaths the entire residue of the estate to his wife and gives a sufficient reason for leaving everything to her.

*George F. Longan and J. W. Suddath & Son* for respondents.

(1) "If plaintiffs show a state of facts which establish a fiduciary relation, or some such similar confidential relation, between the defendant, a principal beneficiary, and the testator, then upon that showing the burden shifts. Not only this but by the proof of such a relation, and such a bequest, the law indulges the presumption that undue influence has been used." *Mowry & Kettering v. Norman*, 204 Mo. 173; *Bradford v. Blossom*, 190 Mo. 143; *Maddox v. Maddox*, 114 Mo. 40. (2) The court did not err in refusing the peremptory instruction asked by defendant because: Whenever there is any substantial evidence of mental incapacity then the case must be submitted to the jury and the higher court will not disturb the verdict, although it deem it against the weight of evidence. *Naylor v. McKuer*, 248 Mo. 423; *Roberts v. Bartlett*, 190 Mo. 695; *Turner v. Anderson*, 236 Mo. 523; *Crum v. Crum*, 231 Mo. 626; *Holton v. Coch-*

ran, 208 Mo. 314; Mowry & Kettering v. Norman, 204 Mo. 173. (3) The burden is upon the defendant to establish the testamentary capacity of the testator by a preponderance of all the testimony, and this burden remains throughout the case. Mowry v. Norman, 223 Mo. 463; Turner v. Butler, 161 S. W. (Mo.) 745; Naylor v. McRuer, 248 Mo. 423; Mowry & Kettering v. Norman, 204 Mo. 173. (4) The court did not err in giving instruction 5, fixing test of mental capacity to make a will, and requiring "ability on the part of the testator to comprehend the ordinary affairs of life." Naylor v. McRuer, 248 Mo. 423; Crum v. Crum, 231 Mo. 626; Turner v. Anderson, 236 Mo. 523; Weston v. Hanson, 212 Mo. 248; Holton v. Cochran, 208 Mo. 314; Roberts v. Bartlett, 190 Mo. 680. (5) The court did not err in giving instruction 3, because it was a clean-cut statement of what the law on the subject under consideration was, at that time, and this is not disputed. R. S. 1855, p. 223. (6) The court did not err in giving instruction 4, because the evidence tended to establish an insane condition of mind existing and exhibiting its peculiarities for a long period of years. An instruction embodying this principle should be given. State v. Lowe, 93 Mo. 570.

GRAVES, J.—Action contesting the will of Benjamin R. Major, who died in Pettis county, November 24, 1910, at the advanced age of 93 years. He left surviving him, Sallie F. Major, and three children, William B. Major, Emma (Major) Short, and Lelia M. (Major) Kidd. The plaintiffs are the son of Benjamin R. Major, and his wife. The widow died shortly after the death of the husband, leaving a will. The defendants are the other two children, Mrs. Kidd and Mrs. Short, and Mrs. Kidd as executrix. The grounds of contest were (1) undue influence exercised over the testator by Mrs. Lelia M. Kidd, the daughter,

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and Sallie F. Major, the wife; and (2) mental incapacity.

Some singular expressions in the will and codicil prompt us to set out the same in full. They read:

"I Benjamine R. Major, of Heaths Creek, Pettis county, Missouri, *though now in unusual strength of body and mind*, yet knowing from my advanced age that my earthly pilgrimage nears its end, do declare, and wish to have published, this, my last will and testament:

"First. After the payment of my funeral expenses, and all just debts, I bequeath to my children, Emma C. Short, Lelia M. Kidd, and Willie B. Major, the sum of one dollar each.

"Second. After the payment of the above named debts and bequests, I bequeath and devise all the residue of my estate, both personal and real, of whatsoever character and description, and wherever situated, at the time of my death, to my beloved wife, Sallie F. Major, to hold the same as her absolute property in fee, with the right and power to use, enjoy and dispose of the same, or any part thereof, by gift, sale, deed or will, as to her may seem proper.

"My purpose and incentive in thus willing and bestowing my estate upon my said wife being to express my recognition of her signal fidelity to me during my married life, as also the fact that it is owing to her good judgment, business management, industry and untiring watchfulness through many years, that my property has been preserved and improved in value; and I have implicit confidence in her ability and disposition to continue to so manage and dispose of it as to best promote her welfare and good purposes.

"It is owing to her tender care and wifely ministrations that, in my advanced age, my health is so much restored *that I am now in the fuller enjoyment of all my faculties than for many years past*; and I

leave this as a lasting testimony of my love and gratitude for and to her.

“Third: I hereby designate and appoint my said wife, Sallie F. Major, the sole executrix of this my last will and testament, and request and direct that she be not required to execute bond as such executrix, and that without making any inventory or appointment of my estate, she pay off and discharge any debts that may exist against my estate, and that she pay over to my said children the special bequests named in the foregoing will; and then apply the residue of my estate to her own use as hereinbefore willed.

“In witness whereof I have hereunto set my hand and seal, this 26th day of October, A. D. 1889.

“BENJAMINE R. MAJOR. (Seal.)

“I, Benjamine R. Major, of Pettis county, Missouri, do hereby make, declare and publish the present writing to be the codicil to the attached and foregoing my last will and testament, which bears date the 26th day of October, 1889.

#### “ITEM I.

“Whereas, in the good providence of God my life has been spared many years beyond my expectations and *the added years have not lessened my mental faculties*, but they have deepened my affection for my beloved wife and shown the justness and wisdom of the devises made in the foregoing will to her, but her advancing age has also warned me that she may not survive me, and I desire during her lifetime and now, while I am of sound and disposing mind, to make a further direction about the descent and distribution of my property in the event that my beloved wife may not survive me.

“In doing so I hereby affirm and confirm the foregoing will and the statements therein contained and especially and particularly direct that nothing herein

contained shall in anywise, change, alter or affect the gifts and devises contained in the foregoing will in the event that my beloved wife survive me, in which event the whole of my estate shall pass and descend as by the foregoing will directed.

**"ITEM II.**

"But if my beloved wife shall not survive me then it is my will and I hereby devise all my property, both real and personal, in the manner following, viz.:

"(a) I give and bequeath to my son William B. Major and his wife, Edmonia Major, all the right, title, interest and estate of which I may die seized of and in and to the lands constituting the farm where they now live, known as the Estill farm, and more particularly described as follows: The southwest quarter of the southwest quarter of section nineteen, and all that part of the northwest quarter section thirty, lying north of Heath Creek, and all in township forty-eight, and range twenty, in Pettis county, Missouri, and containing about one hundred and sixty-seven acres. This description is intended to include all of the place now used and occupied by my said son and his wife.

"To have and to hold during their lives and the full and free use and enjoyment of the same and the rent, issues and profit thereon so long as they or either of them shall live, and the remainder therein after the expiration of the life estate aforesaid to the child or children of their bodies, or their descendants surviving them, then to my residuary legatee and devisee hereinafter named.

**"ITEM III.**

"To my daughter Emma, the wife of U. F. Short, the sum of five dollars, she and her husband having already received sufficient estate from my wife and myself.



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## "ITEM IV.

"All the rest and residue of my estate, both real and personal, of whatever nature, I give, devise and bequeath to my beloved daughter Lelia M. Kidd, and if she should not survive me, then to her children share and share alike.

## "ITEM V.

"It is my intention and desire that should my beloved wife, Sallie F. Major, survive me then that my entire estate pass to her in accordance with the terms of my last will as hereinbefore stated and that she be my sole executrix, but in case she dies before I do, then the estate is to pass as by this codicil directed and my daughter, Lelia M. Kidd, shall be my sole executrix, and I request that in either event neither be required to give any bond as such executrix.

"In witness whereof, I, the said Benjamin R. Major, have to this codicil set my hand and seal this the — day of November, 1897.

"B. R. MAJOR."

The trial court took from the jury the question of undue influence, but submitted the question of mental incapacity. The jury found against the will, and Mrs. Kidd individually and as executrix has appealed. Mrs. Short abided by the judgment *nisi*. The points made are (1) refusing a peremptory instruction to find for the will upon the ground of mental incapacity, and (2) alleged errors in other instructions. These in order in the course of the opinion.

I. The first problem confronting us is defendant's demurrer to the testimony. Courts look with care to the testimony in will cases, to the end that it may be seen that there is substantial testimony upon either undue influence or the question of mental incapacity. Es-

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Rules for  
Contest.

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pecially is this true of mental incapacity, for the reason that opinions of lay witnesses often furnish the basis for the verdict. Courts scan with care such opinion evidence to see that the witness has given a detail of such potent facts, tending to show mental incapacity, as will authorize the expression of an opinion. This and other things spur the courts to a diligent search of the evidence. The law gives one possessed of mental capacity the right to dispose of his property according to his own way of thinking, and it is not for courts or juries to make a will for him. But when this is said, all has been said, as to the prerogative of this court. If there is substantial evidence tending to support the theory of mental incapacity, the verdict of the jury (they being properly instructed) is binding upon this court. At an early date this court announced that the trial of a will case (whilst in a way different) was the trial of issues at law and not in equity, and therefore to be guided by the rules of law cases. The full case law upon this question has been so fully reviewed by our Chief Justice in the case of *Turner v. Anderson* in Banc, 260 Mo. 1, that we refer the anxious thereto, without further encumbering this opinion. I thoroughly agree to the views in the *Turner* case, *supra*. Measured by these rules, the question is, was there evidence sufficient upon the question of mental capacity to take this case to the jury upon that question? We think so. The details of such evidence we take next.

II. The facts of this case are few and simple, although, owing to the great number of witnesses, the record is voluminous. We shall not, on this demurrer, discuss the evidence for the defendants. If the evidence adduced by contestants was substantial upon the question of mental incapacity, it then became a matter for the

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of Testator.

jury, notwithstanding the contradictory proof from contestees.

To start with, this will is badly "ear-marked." Note some of the phrases. In the outset the will-maker, and we use the term advisedly, had the testator to declare that he was "now in *unusual strength* of body and *mind*." Why such declaration, if the mind was really sound? Why emphasize by use of the qualifying word "*unusual?*" Again the will-maker has the testator further declare "that I am now in the fuller enjoyment of all my faculties than for many years past." If it were true, why have him solemnly declare it in the will? Why necessary for a sane man to be persistently reiterating the fact of his sanity in his will? We know that wills frequently use the stock expression of "being of sound mind and memory," but we have never yet seen one wherein the writer undertook to so thoroughly impress the idea of testator's sanity. The same idea has drifted into the codicil. Note the language: "the added years have not lessened my *mental faculties*." Speaking for myself personally I would question the mental status of any man who would append his name to a will so peculiarly worded as is the document presented here as the last will and testament of Benjamine R. Major. But let us leave individual views and get to further facts. The will was in evidence and the jury had the right to consider its terms for all purposes of the case. Then in addition it appears that in 1859 the testator was in robust health, both bodily and mentally. He was in active charge of an exceedingly large farm of his own. He was in truth and in fact the owner and manager thereof. But during the year he became mentally unbalanced, and after three physicians had consulted upon his case he was taken to the asylum for the insane at Fulton, Missouri. He remained there for more than a year, and then returned to the farm. From that day to the day of his death in 1910 he attended

to none of the business upon that farm. His brother and his wife attended to it all. These facts are conclusively shown by a score or more of witnesses. Two doctors, who had occasion to see and talk with him, give it as their opinion that he was of unsound mind. Men and women who worked upon the place say he was of unsound mind, and they detail facts which would authorize them to express an opinion as lay witnesses. Many of the neighbors, who knew him both before and after the sickness of 1859, when his mind went wrong, testified that in their judgment he was of unsound mind during all the years from 1860 to the day of his death. The plaintiffs and the defendant Mrs. Short testify to like effect, and these witnesses detail facts upon which their conclusions are based. In fact, the contestants not only introduced substantial evidence of mental incapacity, but it went far beyond the usual meaning of the term substantial evidence. There was no error in refusing the demurrer to the evidence.

III. For the contestants the court gave this instruction:

“The burden rests upon the defendant to prove, by the greater weight of all the credible evidence, that Benjamine R. Major, at the time of making the will in question, or at the time he made the codicil thereto, possessed a sound and disposing mind and memory, as defined in other instructions.”

This instruction contestee says is error. It places the burden upon the proponents of the will to show the mental capacity of the testator. The writer was called upon to wrestle with this exact question on a previous occasion. [Goodfellow v. Shannon, 197 Mo. l. c. 278.] At that time we made an extended research of the cases in Missouri. We found some of our cases, wherein the question as to the burden of proof was not

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Capacity:  
Burden  
of Proof.**

before this court because not an issue on the record, in which we used some language which might be construed to mean that after a prima-facie case had been made the burden of proof shifted and was then on the contestants. Thus in *Sehr v. Lindemann*, 153 Mo. l. c. 288, we found this language:

“Under the Statute of Wills the owner of property is permitted to dispose of it as he chooses after his death. If he makes no disposition of it by will the Statute of Descents disposes of it for him. When a will is contested it devolves upon the proponents to prove the execution of the will, that the testator was of requisite age and that he was sane. [*Harris v. Hays*, 53 Mo. 90; *Benoist v. Murrin*, 58 Mo. 322; *Norton v. Paxton*, 110 Mo. 456.] This makes out a prima-facie case, and it then devolves upon the contestants to establish incompetency or undue influence.”

But nowhere in that case was the question as to where the burden of proof fell further discussed. Nor had the question been raised by an instruction, as here. The sole question in that case was whether or not there was any substantial evidence to show mental incapacity or undue influence, and *MARSHALL, J.*, held that there was no such evidence. The question is this case was not therefore in that case. So too in *Riggin v. Westminster College*, 160 Mo. l. c. 579, we found this language:

“The rule in this State is, that one who is capable of comprehending all his property and all persons who reasonably come within the range of his bounty, and who has sufficient intelligence to understand his ordinary business, and to know what disposition he is making of his property, has sufficient capacity to make a will. [*Benoist v. Murrin*, 58 Mo. 322; *Jackson v. Hardin*, 83 Mo. 175.] And the law indulges the presumption that the testator was possessed of a sound and disposing mind, and where the formal execution of a will according to the requirements of the statute

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is shown, as was done in the case at bar, and the subscribing witnesses testify to the sanity of the testator, and he is of proper age to make a will, a prima-facie case in favor of the proponents of the will is made out, and the burden of proof rests upon the contestants to overcome this presumption by persuasive evidence."

This case, like the Sehr case, supra, did not call for the expression of any opinion upon the question as to where the burden of proof rested in the issue of mental capacity. The case only calls for a discussion of the question of the sufficiency of the proof. In other words, whether there was any substantial evidence of mental incapacity, and we held that there was no such evidence. These are samples of expressions that we found in several other cases, but they were all cases wherein we were not required to give opinion as to where the burden of proof rested.

At the time of writing the Goodfellow case, supra, we also saw the language used by PHILIPS, Com., in Jackson v. Hardin, 83 Mo. l. c. 182, whereat he said: "The law presumes that the testator was possessed of a sound and disposing mind. And after the statements made by the attesting witnesses, the burden of proof rested on the contestants to overcome this presumption by persuasive evidence." But like the other cases, we went back over the opinion in this case to see what we were called upon to decide. We found that Judge PHILIPS had thus formulated the question: "Applying these established standards to the facts of this case, did the plaintiffs on the issue of mental incapacity make out a prima-facie case?" So this case like the others did not involve the question in the case at bar.

Then in the Goodfellow case, having gone over all this line of cases, wherein we had expressions of the kind indicated above, we turned for cases wherein the question of the burden of proof was a real live

issue. Cases where the matter had to be discussed and determined in order to dispose of the case. After this examination, in *Goodfellow v. Shannon*, 197 Mo. l. c. 278 et seq., we thus summarized our conclusions of the holdings made by this court:

“Defendants criticise instruction number 11, which is in this language:

“ ‘The court instructs the jury that the burden of proof is upon the defendants to show the writing offered as the will of Caroline Shannon was executed by Caroline Shannon as and for her will, and that at the time of the execution thereof said Caroline Shannon was of sound and disposing mind and memory.’

“ ‘This instruction is proper. It simply places the onus upon defendants (the proponents of the will) to show proper execution and attestation, and that the testatrix was of sound mind. This burden has always been upon defendants in will contests. [*Carl v. Gabel*, 120 Mo. l. c. 295; *Norton v. Paxton*, 110 Mo. l. c. 462; *Craig v. Craig*, 156 Mo. l. c. 362; *Maddox v. Maddox*, 114 Mo. l. c. 46.]

“In *Norton v. Paxton*, *supra*, where the very same question was up, it was said: ‘It is sufficient for those who claim under the will to make out a prima-facie case in the first instance. There is a presumption that every adult person is *compos mentis*, but the presumption is one of fact only. It may be that the production of a will, reasonable on its face, with proof of due execution and attestation, and that the testator was of full age, will make out a prima-facie case on the part of the proponents, thus giving full force to the presumption, though the usual course is to offer some evidence of mental capacity. The parties claiming under the will having made out a prima-facie case, the contestants must bring forward their evidence. But it does not follow from all this that the burden of proof shifts. It remains with those claiming under the will.’

“In *Craig v. Craig*, supra, Judge VALLIANT says: ‘It is as essential that the testator be proven of sound mind at the time as that the instrument was executed in due form, yet this court has held that it is not essential that both subscribing witnesses testify to the soundness of mind in the testator.’

“It, therefore, appears that while our practice requires the making of a prima-facie case by the proponents of the will, by showing the due execution of the will and the sanity of the testator, and then requires contestants to put in their case, it does not shift the burden of proof as to mental capacity, but this burden remains throughout with the defendants, or proponents of the will.”

Our judgment at that time was in a large measure due to the exhaustive review of the case law in Missouri, upon the exact question, by BLACK, J., in *Norton v. Paxton*, 110 Mo. 456, l. c. 461. Judge BLACK in the Norton case said:

“The second instruction given at the request of the contestants is so framed as to direct a verdict for them, unless it appeared from all the evidence that deceased possessed a disposing mind; while the one given for defendant cast the burden upon the contestants to show want of testamentary capacity. They are plainly conflicting, and one of them should have been refused.

“Much has been said in the books concerning the burden of proof in these will cases. Under our law the proceeding to contest a probated will is in the nature of an appeal and a trial *de novo*. There can be no doubt but it devolves upon those who claim under the will to show that it was duly executed and attested, and that the testator was of the requisite age. [*Cravens v. Faulconer*, 28 Mo. 21; *Tingley v. Cowgill*, 48 Mo. 294.]

In *Harris v. Hays*, 53 Mo. 90, it was said the proper course is for the proponents of the will to in-



introduce the subscribing witnesses, and establish by them the execution of the will and the sanity of the testator. This makes out a prima-facie case, and the burden of establishing incompetency or undue influence rests then on the contestants. In the case of *Benoist v. Murrin*, 58 Mo. 322, the contestants admitted the genuineness of the signatures of the testator and the witnesses, but did not admit the sanity of the testator. This court denied to contestants the right to open and close, and in clear and unqualified terms held that it devolved upon those claiming under the will to establish the sanity of the testator. It also held that this burden was not shifted during the trial by proof of the factum of the will and testamentary competency by the attesting witnesses, but remained with the party setting up the will. *Jackson v. Hardin*, 83 Mo. 178, is cited as asserting a different rule, but we do not so understand that case.

"It is sufficient for those who claim under the will to make out a prima-facie case in the first instance. There is a presumption that every adult person is *compos mentis*, but the presumption is one of fact only. It may be that the production of a will, reasonable on its face, with proof of due execution and attestation, and that the testator was of full age, will make out a prima-facie case on the part of the proponents, thus giving full force to the presumption, though the usual course is to offer some evidence of mental capacity. The parties claiming under the will having made out a prima-facie case, the contestants must bring forward their evidence. But it does not follow from all this that the burden of proof shifts. It remains with those claiming under the will.

"As said by Mr. Schouler: 'And the larger and better class of American authorities point, moreover, to the conclusion that the court or jury trying the case must, upon the whole evidence, be satisfied that the testator was of sound mind; so that, if there be

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inevitable doubt left on this point from all the testimony, the will cannot be considered as proved.' [Schouler on Wills, sec. 174.] This is in accord with the previous rulings of this court. It follows that the instruction given at the request of the contestants is correct, and the one given at the request of the defendants is wrong."

This was a case in which the question of where rested the burden of proof was the crux of the case, as it was in the Goodfellow case, *supra*. The Norton case was cited with approval by MACFARLANE, J., in *Maddox v. Maddox*, 114 Mo. l. c. 46, whereat he said:

"The onus is on the proponents of a will, in a contest of this character, to prove its proper execution and attestation and also that the testator was of proper age and of sound mind. When these facts are shown, a will *prima-facie* valid is established, and it then devolves upon those attacking its validity to prove fraud or undue influence, if either is charged. [*Norton v. Paxton*, *supra*; *Gay v. Gillilan*, 92 Mo. 255; *Woerner's American Law of Administration*, sec. 31; *Jones v. Roberts*, 37 Mo. App. 174; *Schouler on Wills*, sec. 239.]"

In *Carl v. Gabel*, 120 Mo. l. c. 294, where the matter again came up on an instruction, as in the case at bar, BRACE, J., said:

"We find no error in the refusal of the court to give defendant's instruction number 10 or in giving number 1 for plaintiff. While it was not directly alleged in the petition that the testatrix was not of sound mind, this issue was necessarily involved in the issue which the court under the statute is required to frame and submit to the jury, i. e., 'Whether the writing produced be the will of the testator or not,' which issue must be tried by the jury. The court had no right to withdraw any part of that issue from the consideration of the jury. It is well settled law in this State

that 'the onus is on the proponents of a will, in a contest of this character, to prove its proper execution and attestation and also that the testator was of proper age and of sound mind. When these facts are shown, a will prima-facie valid is established, and it then devolves upon those attacking its validity to prove fraud or undue influence, if either is charged.' [Maddox v. Maddox, 114 Mo. 35, and authorities cited; Harris v. Hays, 53 Mo. 90.]"

In effect Judge BRACE says that the question of mental capacity is in all will cases. And if we were called upon (and I expect we are in the instant case) to give a reason for the Missouri rule, we would answer that it is because of the wording of our Statute of Wills. The statute not only says how wills shall be made, but it also says who can make them. Section 535, Revised Statutes 1909, reads:

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Capacity:  
The Statute.**

"Every male person, twenty-one years of age and upward, of sound mind, may, by last will, devise all his estate, real, personal and mixed, and all interests therein, saving the widow her dower. And every male person over the age of eighteen years, and of sound mind, may, by last will, bequeath all his personal estate, saving the widow her dower."

Section 536 speaks of women, but has the same phrase as to soundness of mind. Taking a will; which conveys land, made by a male, before it is a will at all, it must be by a male person over twenty-one years of age, and by a male person of sound mind. Before such will can be admitted to probate, if it conveys lands, it must be shown (1) that the person was a male person, (2) that he was over the age of twenty-one years, and (3) that he was of sound mind. It is just as much a part of the case for proponents of such a will to show mental soundness as it is to show sufficient age, in an attempt to probate or prove the will. We are speaking now of the probate court. As to what the

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proof shall be in that court, section 551, Revised Statutes 1909, says:

"If such witness appear before such officer, and make oath on affirmation that the testator signed the writing annexed to such commission, as his last will, or that some other person signed it by his direction, and in his presence, *that he was of sound mind*, that the witness subscribed his name thereto in the presence of the testator, the testimony so taken shall have the same force as if taken before the court or clerk."

Thus it would seem that the proof required to probate a will in the first instance goes not only to the formal execution of the will, but also to the mental condition of the testator as well. In other words, the proof must show that the person falls within the class authorized to make wills, i. e., those of sound mind, as classified by sections 535 and 536, Revised Statutes 1909.

If the statutes place this onus or burden upon the proponents in the probate court, as they clearly do, then per force of the same statutes it remains there in the circuit court, because a will contest under our statute is but the probating or rejecting of a will. Such to me seems a sufficient reason for our rule. That the rule in Missouri is as stated in the instruction attacked in this case, has been conceded by text-writers. In 1 Underhill on the Law of Wills, section 86, it is said:

"In Michigan, Maine, Missouri and Vermont, the courts hold that the burden of proof to show capacity is upon him who propounds the will for probate, and that it is not met by making out a prima-facie case, but remains upon him throughout the trial. In some cases the courts which hold that the burden of proof is upon the proponent throughout, based upon the theory that there is a difference in the mode of proof which is required in the case of the probate wills and that required in the case of an instrument *inter vivos*."

It is safe to say that in every Missouri case when the question of where the burden of proof rested was the crux of the case upon appeal, we have always held that the jury, as to mental capacity, should be told that the burden was upon the proponents of the will, throughout the whole case, to show mental capacity. With this rule we are satisfied, and shall not depart therefrom now. The instruction given for plaintiffs declared the law.

IV. The fifth instruction given at the instance of the plaintiff is sharply criticized. This instruction reads:

“The court instructs the jury that in determining the issue of sufficient soundness of mind or testamentary capacity, possessed by the testator, to make a will, you are instructed that if a person has not mind and memory enough to understand the ordinary affairs of life, the value, extent, and nature of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment of him, their capacity and necessity, and has not active memory enough to retain all these facts in his mind long enough to have this will prepared, he has no power to dispose of his property by will.”

Ordinary  
Affairs  
of Life.

The clause objected to is “to understand the ordinary affairs of life.” Defendants say this is too broad. We do not think so. If a person hasn’t sufficient intelligence to understand the ordinary affairs of life he should not be permitted to make a will by which estates, either large or small, pass. The law graciously allows the disposition of property by will, because the owners thereof may have good and sufficient reasons for diverting it from the channels fixed by the Statutes of Descent and Distributions. But this method of conveying property must be understand-

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ingly done. It cannot be done by a befogged and clouded mind, and for that reason the statute only authorizes a person of sound mind to make a will. One who does not have mind enough to comprehend and understand *the ordinary*, as distinguished from the intricate and complicated affairs, of life, has not that degree of mentality requisite for the making of a will. This test as to mental capacity was approved by LAMM, P. J., in *Crum v. Crum*, 231 Mo. l. c. 638, whereat, among other cases, he cites the exhaustive opinion of the Indiana court in *Bower v. Bower*, 146 Ind. l. c. 398 et seq. Division Two of this court lent its endorsement to this test of mental capacity in an opinion by FARIS, J., in *Naylor v. McRuer*, 248 Mo. l. c. 462. Thus both divisions of this court have recently approved the test of mental capacity fixed by this instruction numbered 5 for plaintiffs, and we see no reason to depart from these cases. Counsel cites us to no cases condemning such a test, and we still think the rule announced in the *Crum* case, *supra*, is well grounded.

V. Complaint is made of the following instructions:

“The court instructs the jury that under the law as it existed in 1859 and 1860, it was not required that a person be adjudged insane by any court or tribunal in order that he be placed in the insane asylum, but might be sent as private patient upon the certificate of two physicians.”

As an abstraction the instruction properly declares the status of the law at that time. [R. S. 1855, p. 223.] It was abundantly shown that deceased was taken to the asylum at Fulton and remained there for over a year. Under such circumstances the instruction would at least be harmless. The fact is that this case might be tried fifty times, and in our judgment

there would be fifty verdicts against this will. This instruction evidently did the defendant no harm. What we have said as to instruction number 3, *supra*, applies with equal force to the harmless effect of instruction number 4, which is criticized. We doubt whether there is error in either of these instructions, but even if there is technical error, it is not such as affected the rights of the parties.

In my limited experience I have never read a will case wherein the judgment of the jury was so righteously wrought as in this case. Let the judgment be affirmed.

This case coming into Banc on a dissent, on a new hearing this, the divisional opinion of GRAVES, J., is adopted as the opinion of the Court. *Woodson, Walker and Faris, JJ.*, concur; *Brown, J.*, concurs in a separate opinion; *Lamm, C. J.*, does not sit; *Bond, J.*, dissents for reasons given in his dissenting opinion in *Turner v. Anderson*, 260 Mo. 1.

BROWN, J.—I concur in the views of brother GRAVES as expressed in the majority opinion. However, I do not approve the form of instruction number 5 given at the request of plaintiffs. In the aforementioned instruction testator is required to be able to understand the “*capacity and necessity*” of those who are the natural objects of his bounty. I do not understand the law to be that anyone is rendered ineligible to take under a will because he is deficient mentally or physically, nor do I believe that a testator is bound to know the “*necessity*” of those who are the natural objects of his bounty. If the testator’s mind is strong enough to make a valid will he may give to those who have property and withhold his bounty from those who need it most.

That part of instruction number 5 referred to in ~~this~~ concurring opinion is not criticised by appellants,

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and was not relied upon by them in their brief as a ground for reversal. I do not understand how it could have been harmful to appellants, under the facts of this particular case, but I can imagine cases where it might prove harmful, and this criticism is advanced to discourage its use in will contest cases.

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THE STATE ex rel. S. J. CLARK et al. v. JOHN P.  
GORDON, State Auditor.

In Banc, November 17, 1914.

1. **CONSTITUTIONAL LAW: Title: Consolidated School Districts.** The title of an act which is, "An act to provide for the organization of consolidated schools and rural high schools and to provide State-aid for such schools," does not contain two subjects, and does not violate section 28 of article 4 of the Constitution. It but deals with two phases of the same subject, namely, the organization of school districts and State-aid thereto, but in its entirety relates to but one subject.
2. ———: **State-Aid: Appropriation: Aided by Other Acts.** An act which attempts to grant State-aid to consolidated schools and rural high schools and provides that, when certain conditions have been complied with, certain sums of money shall be paid to the district out of the State Treasury, and that the State "shall make adequate appropriations for carrying out" said provisions, must be read in connection with the biennial school appropriation bill; and if, when that is done, both together constitute a "regular appropriation made by law," the act will not be held to be violative of section 43 of article 4 of the Constitution.
3. ———: ———: **Grant of Public Money.** The clause of the Constitution (Sec. 46, art. 4) that prohibits the Legislature from making any grant of public money "to any individuals, municipal or other corporation," does not have any reference to corporations belonging wholly to the State, and does not prohibit the grant of State aid to consolidated schools or rural high schools.



4. ———: ———: ———: Ordinary School Moneys. Sections 2 and 6 of article 4 of the Constitution are applicable to the ordinary school funds to be distributed to the ordinary public schools, and not to these funds which the State may specially appropriate to other schools.
5. ———: ———: General Revenue: Any Public Purpose. General revenue, collected by the State, by taxation, from all parts thereof, is not the private property of any county or school district, but is the property of the State, and may be appropriated and used for any governmental purpose which the Legislature deems wise; for instance, it may be used in aid of the establishment and maintenance of consolidated schools or rural schools, whose organization the Legislature has authorized.
6. CONSOLIDATED SCHOOLS: Power to Issue Bonds: Found In Other Acts. The Act of 1913 providing for the organization of consolidated school districts for elementary and high schools does not in so many words authorize such a district to issue bonds; but the act deals with the general subject of public education, and should be considered a part of the general school laws pertaining to schools of their class, such as Sec. 10777, R. S. 1909, and when that is done such districts have authority to issue bonds for the purposes authorized by those general laws.

### Mandamus.

WRIT ALLOWED.

*Boyd Dudley and Bowersock, Hall & Hook* for relators.

(1) The act relates to but one subject, namely, consolidated school districts, and therefore does not violate section 28 of article 4 of the State Constitution. *State v. Miller*, 45 Mo. 497; *Ewing v. Hoblitzelle*, 85 Mo. 70; *State ex rel. v. Miller*, 100 Mo. 444; *State v. Morgan*, 112 Mo. 212; *State ex rel. v. Bronson*, 115 Mo. 275; *St. Louis v. Weitzel*, 130 Mo. 614; *State v. Bixman*, 162 Mo. 16; *Elting v. Hickman*, 172 Mo. 251; *State v. Doering*, 194 Mo. 408; *O'Connor v. Transit Co.*, 198 Mo. 633; *State ex rel. v. Delmar Club*, 200 Mo. 56; *State v. Brodnax*, 228 Mo. 53; *State ex*

rel. v. Williams, 232 Mo. 75. (2) Sections 7 and 8 of the act, when read in conjunction with the biennial school appropriation bill, constitute "a regular appropriation made by law," and therefore do not violate section 43 of article 4 of the Constitution. *Campbell v. Board*, 115 Ind. 591. But even if sections 7 and 8 of the act are invalid, the rest of the statute can stand alone. *State ex rel. v. Taylor*, 224 Mo. 474; *State ex rel. v. Gordon*, 236 Mo. 170; *State ex rel. v. St. Louis*, 241 Mo. 246. (3) The act does not constitute a grant of public revenue to any individual or corporation, and so does not violate section 46 of article 4 of the Constitution. Sec. 10822, R. S. 1909. (4) Consolidated school districts organized under the act in question have the power to issue bonds. Sec. 10777, R. S. 1909. (5) The officers of the school district whose bonds are in question, had power to issue the bonds when they so acted. There is a strong presumption that the act is constitutional. *State ex rel. v. St. Louis*, 241 Mo. 247.

*John T. Barker*, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for respondent.

(1) The act in question is in violation of section 28, article 4, of the Constitution, in that the title contains two subjects: First, the organization of consolidated schools and rural high schools, and, second, the granting of State aid therefor. *State ex rel. v. Gordon*, 223 Mo. 17. (2) The act in question is in violation of section 43 of article 4 of the Constitution of Missouri, in that sections 7 and 8 of said act attempt to grant money as aid to said school districts, when as a matter of fact there was no appropriation by the Legislature of such money. The Legislature never intended these sections to appropriate any moneys whatsoever, but the appropriation was to be made at a separate and distinct time, by a separate

and distinct act. There is no attempt to appropriate or set aside a specific sum or fund from which said State-aid could be paid as provided by paragraph 7 of section 43 of article 4 of the Constitution. *State ex rel. v. Henderson*, 160 Mo. 213. This court makes a clear distinction between an appropriation and a duty to appropriate. If the appropriation was not made the whole act falls, as the State aid was the inducement for the passage of the act and the formation of the district. *State ex rel. v. St. Louis*, 241 Mo. 231. (3) The act in question is unconstitutional and in violation of the provisions of section 46 of article 4 and article 9, and more particularly sections 2 and 6 of said article 9 of the Constitution. (4) The act approved March 14, 1913, does not confer upon or give authority to any consolidated school district organized thereunder and in accordance therewith to issue any bonds whatsoever in manner and form as alleged in relators' petition for writ of mandamus.

WOODSON, J.—This is an original proceeding in mandamus, instituted in this court by the relators, the directors of Consolidated School District No. 1 of Daviess county, against John P. Gordon, State Auditor, to compel him to register and certify certain bonds of the district issued by it under section 10777, Revised Statutes 1909.

No question is raised as to the sufficiency of the pleadings, the proper formation of the district, the election of the directors or the regularity of the issuance of the bonds.

The sole questions here presented by respondent challenge the constitutionality of the Act of the Legislature of 1913, Laws 1913, pp. 721 to 725, under which the school district was organized.

Said act provides for the organization of consolidated schools and rural high schools, and provides State aid for such schools, with an emergency clause.

The act consists of nine sections and is found in Laws 1913, on pages 721 to 725, and it reads as follows:

“Section 1. *Consolidated district for elementary and high school may be formed.*—The qualified voters of any community in Missouri may organize a consolidated school district for the purpose of maintaining both elementary schools and a high school as hereinafter provided. When such new district is formed it shall be known as consolidated district No. — of — county, and all the laws applicable to the organization and government of town and city school districts, as provided in article 4, chapter 106, of the Revised Statutes of Missouri, 1909, shall be applicable to districts organized under the provisions of this act.

“Sec. 2. *Consolidated district—area and enumeration of.*—No consolidated district shall be formed under the provisions of this act unless it contains an area of at least twelve square miles or has an enumeration of at least two hundred children of school age: Provided, that no district formed under the provisions of this act shall include within its territory any town or city district that at the time of the formation of said consolidated district has, by the last enumeration, two hundred children of school age.

“Sec. 3. *Petition to form consolidated district filed with whom—duties of county school superintendent—meeting—organization of.*—When the resident citizens of any community desire to form a consolidated district, a petition signed by at least twenty-five qualified voters of said community shall be filed with the county superintendent of public schools. On receipt of said petition, it shall be the duty of the county superintendent to visit said community and investigate the needs of the community and determine the exact boundaries of the proposed consolidated district. In determining these boundaries, he shall so locate the boundary lines as will, in

his judgment, form the best possible consolidated district, having due regard also to the welfare of adjoining districts. The county superintendent of schools shall call a special meeting of all the qualified voters of the proposed consolidated district for considering the question of consolidation. He shall make this call by posting within the proposed district ten notices in public places, stating the place, time and purpose of such meeting. At least fifteen days' notice shall be given and the meeting shall commence at two o'clock p. m. on the date set. The county superintendent shall also post within said proposed district five plats of the proposed consolidated district at least fifteen days prior to the date of the special meeting. These plats and notices shall be posted within thirty days after the filing of the petition. The county superintendent shall file a copy of the petition and of the plat with the county clerk and shall send or take one plat to the special meeting. The special meeting shall be called to order by the county superintendent of schools or some one deputed by him to call said meeting to order. The meeting shall then elect a chairman and a secretary and proceed in accordance with section 10865, Revised Statutes 1909. The proceedings of this meeting shall be certified by the chairman and the secretary to the county clerk or clerks, and also to the county superintendent or superintendents of schools of all the counties affected. If the proposed consolidated district includes territory lying in two or more counties, the petition herein provided for shall be filed with the county superintendent of that county in which the majority of the petitioners reside. The county superintendent shall proceed as above set forth, and in addition shall file a copy of the petition and of the plat with the county clerk of each county from which territory is proposed to be taken.

*“Sec. 4. Transportation—may be voted on.—*The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of this act, it shall then be the duty of the board of directors to maintain an elementary school within two and one-half miles by the nearest traveled road of the home of every child of school age within said school district: Provided further, that if transportation is not provided for, any consolidated district may, by a majority vote at any annual or special meeting, decide to have all the seventh grade and the eighth grade work done at the central high school building, provided fifteen days’ notice has been given that such vote will be taken. Such seventh and eighth grade work at the central school may be discontinued at any time by a majority vote taken at any annual or special meeting.

*“Sec. 5. Parts of districts remaining after consolidation—procedure.—*Whenever, by reason of the formation of any consolidated school district, a portion of the territory of any school district has been incorporated in the consolidated district, the inhabitants of the remaining parts of the districts shall proceed in accordance with section 10882, providing for the annexation to city school districts, and the consolidated district shall be governed by the same provisions as govern city school districts in such cases. The inhabitants of the remaining parts of the districts may also annex themselves to any other adjoining district or districts by filing a petition asking to be so annexed with the clerk or clerks of the district or districts to which they desire to be annexed, and by also filing a copy of all such petitions with the clerk of the county court.

*“Sec. 6. Settlement of property—original districts to continue—how long.—*Whenever any consoli-

dated district is organized under the provisions of this act, the original districts shall continue until June 30th following the organization of said consolidated district, and at that time all the property, money on hand, books and papers of the school districts whose school-house sites are included within said consolidated district shall, by the officers of aforesaid districts, be turned over to the board of directors of the consolidated district, and also all bonds outstanding against the aforesaid districts shall become debts against the consolidated district. The division of property and money on hand, in case school districts are divided by the formation of any consolidated district, shall be governed by sections 10839 and 10840.

“Sec. 7. *State aid—when granted—how.*—When ever a district organized under the provisions of this act has secured a site of not less than five acres for the central high school building of said district and has erected thereon a school building, suitable for a central school and containing one large assembly room for the meeting of the citizens of the district and has installed a modern system of heating and ventilating, the State shall pay one-fourth of the cost of said building and equipment, provided the amount thus paid by the State shall not exceed two thousand dollars (\$2000) for any one district. The State of Missouri shall, out of the general revenue fund of the State, make adequate appropriation for carrying out the provisions of this section, and the money due any district shall be remitted by the Auditor to the county treasurer of the proper county on receipt of a certificate from the State Superintendent of Public Schools stating that the conditions herein prescribed have been complied with.

“Sec. 8. *Special State aid granted—when—how.*—When a consolidated district has been organized as herein provided and has provided adequate buildings for school purposes, the State shall grant a special aid

of twenty-five dollars (\$25) per year for each square mile or fraction thereof in the area of said district: Provided, the district maintains an approved high school of at least the third class and gives an approved course of at least one year in agriculture; and provided further, that no district shall receive more than eight hundred dollars per year under the provisions of this section. The State of Missouri shall, out of the general revenue fund of the State, make adequate appropriation for carrying out the provisions of this section. The money herein provided shall become due on June 30th of each year, and the district clerk shall, on or before June 30th, make application to the county clerk for the aid due his district and the county clerk shall certify these applications to the State Superintendent of Public Schools, who shall approve them and certify to the State Auditor the amount due each district under the provisions of this act. The State Auditor shall draw his warrant on the State Treasurer for the said amount and remit to the treasurer of the proper county."

Section 9 is the emergency clause and need not be set forth.

I. The first objection urged against the constitutionality of the act under consideration relates to its title. It is claimed that it violates section 28 of article 4 of the Constitution of 1875, in this "that the title contains two subjects: First, the organization of consolidated schools and rural high schools; and, second, the granting of State aid thereto."

This objection is without merit. The act relates to but one subject, namely, consolidated and rural high schools. While it deals with two phases of the same subject, the organization of the districts and their financial aid by the State, yet that fact constitutes no constitutional objection to the act, when it as an entirety relates to but one subject.



This has been so frequently declared by this court it would be a useless waste of time and labor to more than briefly refer to some of those cases.

In *Ewing v. Hoblitzelle*, 85 Mo. 64, l. c. 71, this court said: "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title, the statute is valid."

To the same effect are the following cases: *State ex rel. v. Vandiver*, 222 Mo. 206, l. c. 219; *State v. Miller*, 45 Mo. 495, 497; *State ex rel. v. Miller*, 100 Mo. 439, 444; *State v. Morgan*, 112 Mo. 202, 212; *State ex rel. v. Bronson*, 115 Mo. 271, 275; *St. Louis v. Weitzel*, 130 Mo. 600, 614; *State v. Bixman*, 162 Mo. 1, 16; *Elting v. Hickman*, 172 Mo. 237, 251; *State v. Doerring*, 194 Mo. 398, 408; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 633; *State ex inf. v. Jockey Club*, 200 Mo. 34, 56; *State v. Brodnax*, 228 Mo. 25, 53; *State ex rel. v. Williams*, 232 Mo. 56, 75.

This question is therefore ruled against the respondent.

II. The second objection made to the validity of the act is stated in this language: "The act in question is in violation of section 43 of article 4 of the Constitution of the State of Missouri, in that sections 7 and 8 of said act attempt to grant money as aid to said school districts, when as a matter of fact there was no appropriation by the Legislature of such money."

This objection is also untenable. For when we read said sections 7 and 8 in connection with the biennial school appropriation bill, which we must do, it constitutes "a regular appropriation made by law," and does not therefore do violence to said section 43 of the Constitution.

This was the view the Supreme Court of Indiana took of a similar statute in the case of *Campbell v. Board of Commissioners*, 115 Ind. 591. There the Legislature appropriated a certain fund for the purpose of erecting a monument to the memory of the soldiers and sailors of that State. A question arose as to the right of the commission to use the money so appropriated for the monument, in the payment of the incidental expenses connected therewith. The court held that the entire appropriation had to be used on the monument proper, and that by reading that statute in conjunction with the general revenue laws of the State, the Auditor was authorized to draw his warrant against the general funds, with which to pay said incidental expenses.

By parity of reasoning we must read said sections 7 and 8 in connection with said general appropriation bill for school purposes; and by so doing, we are of the opinion that the proper appropriation was duly made.

We, therefore, rule this objection against the respondent.

III. It is next contended that said act is unconstitutional because it violates "section 46 of article 4 and article 11 and more particularly sections 2 and 6 of said article 11 of the Constitution."

Section 46 prohibits the Legislature from making any grant, etc., "to any individual, association of individuals, municipal or other corporation." This section has no reference to corporations *belonging* wholly to the State, organized wholly for governmental purposes under public laws and governed by officers duly elected or appointed according thereto; for instance, the various eleemosynary institutions of the State, State University, normal schools, public schools, drainage and road districts, etc. This has

been expressly so held by this court in the case of State ex rel. v. Taylor, 224 Mo. 393, l. c. 468.

Sections 2 and 6 of said article are applicable to the ordinary school funds to be disbursed to the ordinary public schools of the State, and not to those funds which the State specially appropriates to the University, normal schools and those of the character here under consideration; otherwise, State aid could not be rendered to the University or to the various normal schools of the State. This contention is without merit.

It has been further suggested in this connection that the general revenues of the State, collected, as they are, from all parts thereof, cannot lawfully be expended for the purposes of purchasing grounds, constructing buildings and paying teachers in the various local districts formed or to be formed under the act in question. In my opinion this suggestion is also without merit, for the reason that the State, at the present time and for many years previous, has been collecting taxes from all over the State and applying them to the uses of the local district schools, normal schools and the University. The two latter are supported solely by taxes so collected, and the former very largely from the same source, amounting to many hundreds of thousands of dollars. This is upon the theory that money acquired by the State or county by taxation is not the private property of any county or school district, but is the property of the State, which may be used for any public purpose the Legislature may deem wise.

In discussing this question this court, in Banc, unanimously held in the case of State ex rel. v. Taylor, 224 Mo. 393, l. c. 468, that:

"And the statute authorizing the county to pay out of its revenues claims of this character against such district does no violence to any constitutional provision to which our attention has been called.

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State ex rel. v. Gordon.

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“It is well settled law, that money acquired by a county from the taxation of its citizens is not the private property of the county, and an act of the Legislature directing such county to appropriate a portion of its funds so acquired to pay a part of the public expenses of a city within its limits is not an appropriation of public funds to private use, and is not the taking of private property for the public use without just compensation. [State ex rel. v. St. Louis County, 34 Mo. 546.]

“And in the case of the City of Hannibal v. Marion County, 69 Mo. 571, this court held that the Legislature had the authority to say what shall be done with the taxes levied and collected from any county. There an act of the Legislature required the county to pay to the city out of the general revenue of the county the sum collected from the city for bridge tax and poll tax, and was not unconstitutional.

“The rule announced in these cases clearly applies to the facts of this case. This district is as much a public corporation as were the cities of St. Louis and Hannibal; and the taxes collected by Chariton county were no more the private property of the county in this case than were the revenues involved in those cases the private property of Marion and St. Louis counties.

“If the Legislature had the authority to apply the revenues of those counties for the purposes therein stated, then for stronger reasons it had the authority to apply the revenues of Chariton county for the purposes herein stated, because the drainage district in question is not independent of the county, but, upon the other hand, it owes its being to and is subject to its authority and control in the same sense in which townships of a county are subject to its control. It does not even have the independent government like townships have under the township organization.

The county court administers its entire affairs, and the county clerk keeps its records.

"The cases before cited and the views expressed are not in conflict with section 46 of article 4 of the Constitution, as contended for by relators. That section reads as follows: 'The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, that this shall not be so construed as to prevent the grant of aid in a case of public calamity.'

"That section of the Constitution does not prohibit the Legislature from making use of an individual or a corporation as a means through which it may apply appropriations to lawful purposes.

"In the case of *State ex rel. v. Seibert*, 123 Mo. 424, it was held that a private corporation or individual may be the recipient of funds raised by taxation provided the use to which they are to be devoted is a public one. And in the case of *State ex rel. v. City of St. Louis*, 174 Mo. 125, it was also held that an ordinance of the city appropriating the expenses that a policeman incurred while in the performance of his duty as such officer, in removing a nuisance from a public street, as expressly required by law, was not a donation of public money to an individual in violation of said constitutional provision.

"While this court in the case of *State ex rel. v. County Court*, 142 Mo. 575, held that an act of the Legislature transferring county taxes to the town of Kirkwood for street purposes was a violation of said constitutional provision and void for that reason, yet that opinion was based upon the fact that the county in that case had no concern or control whatever over the streets of the town. In that case the streets were vested in the town, and its charter gave it the exclusive jurisdiction of and control over its streets.

“But not so with these drain ditches. They are acquired by donation, purchase or condemnation, and the titles there are vested either in the drainage district or the county for the use of the public, and under the exclusive charge and control of the county court. The title to the same is not vested in the landowners of the district. That is made clear by the fact that they may be and often are acquired by condemnation. The landowners by virtue of their ownership of the lands embraced within the district have no authority over the ditches proper. It is true the Drainage Act imposes the duty upon the respective landowners to keep the ditch clear of all obstructions where it passes along or through their lands, but that is not because they have any interest in or authority as individuals over the ditch; but being public aqueducts, the Legislature, through the exercise of the police power, imposes the duty upon them to keep them free from obstructions upon the same principle and authority that it compels the property-owner to keep the sidewalk in front of his property free from snow and other obstructions.

“Nor has the drainage district itself any authority or control over the ditches, nor does the law require it to keep the ditches free from obstructions. That is obvious from the fact that it has no officers or means by which it could do so. It is without autonomy, and, as before stated, the exclusive regulation and control over these ditches is vested in the county court, and the Drainage Act imposes the duty upon it to see that they are constructed, maintained and kept free from all obstructions.

“We have discussed these matters somewhat extensively for the purpose of showing that they are not only public corporations, but that they are under the sole and exclusive charge and control of the county court, and that the money the court is au-

thorized to expend by said sections 8299 and 8306 is expended for a public and not a private use.

“The very case cited and relied upon by counsel for relator, *State ex rel. v. County Court, supra*, recognizes the very distinction we have here drawn, and in express terms distinguishes that case from the cases of *State ex rel. v. Seibert*, and *City of Hannibal v. County of Marion, supra*, which we have before cited and discussed.”

From these observations it is seen that so long as the revenues expended are used for public purposes, that is, for purposes which are governmental in character, the Legislature has the constitutional authority to authorize their expenditure, whether they are expended through the agency of a purely public corporation or a municipal corporation, which acts in a dual capacity—for the public proper, and for itself in its private capacity. These views are firmly supported by numerous authorities in this and other States.

IV. It is finally insisted that the Act of 1913 does not confer authority upon consolidated school districts organized thereunder to issue any bonds whatsoever.

Literally speaking this insistence is true, but when we take into consideration the fact that the Legislature was dealing with the general education of its citizens and authorized this higher class of instruction, it is apparent that it intended that the general school laws of the State, in so far as applicable, should be read in connection with this class of schools, in order to carry out the general design and intention of the legislative body.

The Legislature knew that this class of schools had no school property—lands, buildings or other instrumentalities—with which to carry on the school work, no more than the ordinary public school has when first organized, without resort should be had

to borrowing money for those purposes. That being true we must look at the general school laws of the State regarding this subject, and read it in connection with this incomplete act; and by so doing, we find that section 10777, Revised Statutes 1909, provides for the issuance of bonds for the purposes for which those in controversy were issued.

In the discussion of the subject of the construction of statutes *in pari materia* this court in the case of Sales v. Barber Asphalt Paving Co., 166 Mo. l. c. 677 to 678, held, and quoted with approval from Mr. Sutherland, the following language:

“‘All consistent statutes relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day.’ [Sutherland, Stat. Construct., sec. 283.]

“‘And ‘A statute must be construed with reference to the system of which it forms a part. And statutes on cognate subjects may be referred to, though not strictly *in pari materia*.’ [Id., sec. 284.]

“‘Further on, the learned author discussing and discoursing upon the same subject, says: ‘Where enactments separately made are read *in pari materia*, they are treated as having formed, in the minds of the enacting body, parts of a connected whole, though considered by such a body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one



spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony, if possible, by interpretation, though they may not refer to each other even after some of them have expired or been repealed.' [Ib., sec. 288.]"

This language was also approved by this court in the cases of *State ex rel. v. Standard Oil Co.*, 218 Mo. l. c. 355, and *State ex rel. v. Patterson*, 207 Mo. l. c. 144.

In the case of *State ex inf. v. Amick*, 247 Mo. 271, l. c. 290, this court in discussing the same subject quoted approvingly from the case of *Humphries v. Davis*, 100 Ind. l. c. 284, the following:

"In the case of *Humphries v. Davis*, 100 Ind. l. c. 284, the Supreme Court of Indiana, speaking through ELLIOTT, J., said: 'A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look at other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. [Citing authorities.] . . . "Construction has ever been a potent agency in harmonizing the operation of statutes with equity and justice." Statutes are to be so construed as to make the law one uniform system, not a collection of divers and disjointed fragments. When this principle of construction is adopted, "an enactment of to-day has

the benefit of judicial renderings extending back through centuries of past legislation." [Bishop, Written Laws, sec. 242b.] "A statute," says the author just referred to, "must be construed equally by itself and by the rest of the law. The mind of the interpreter, if narrow, will stumble." "The completed doctrine resulting from a bringing together of its parts, is, that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting and extending one another into one system of jurisprudence as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms." [Bishop, Written Laws, secs. 113a, 86.]' "

This act is progressive and in keeping with the forward movement of the State and country at large—bringing home better schools and higher grades of instruction, which the ordinary public schools do not teach, and are incapable of teaching on account of the lack of means to construct appropriate buildings and to employ competent teachers. By this scheme of the Legislature thousands of our children can and will be instructed in the higher branches of education not taught in the ordinary school, who are unable to go to city high schools, colleges and universities away from home.

The design of the Legislature is good and wise, and before the act conferring this beneficence upon the youth of the country should be declared invalid, the reasons therefor should be so clear and unanswerable that no reasonable doubt should exist as to its unconstitutionality; and after a careful reading of the briefs of the respective parties and having investigated the authorities cited, we are of the opinion that no such reason has been pointed out.

But upon the contrary we are firmly of the opinion that the act is valid; and that the peremptory writ of mandamus prayed for should issue.

It is so ordered.

All concur, except *Lamm, C. J.*, not sitting.

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**RALPH H. ORTHWEIN v. GERMANIA LIFE  
INSURANCE COMPANY OF CITY OF NEW  
YORK and GENEVA LEOTA ORTHWEIN,  
Appellants.**

In Banc, November 17, 1914.

1. **PLEADING: Liberally Construed.** Allegations of pleading must be liberally construed with a view to substantial justice.
2. ———: **Insurance Policies: Lex Loc: Venue: Margin.** A venue laid in the margin of the petition, thus, "In the Circuit Court, City of St. Louis, State of Missouri," will be the venue for all other matters requiring a venue arising from the petition, none special being pleaded. So that, where the petition is grounded on policies issued by an insurance company, alleged to be organized in another State, but authorized to do business in this State, it will not be *held*, in adjudging its sufficiency to state a cause of action, upon a demurrer thereto, that it is silent as to where the policies were executed or delivered, in that it contains no allegations showing they were governed by the laws of this State; for, if it alleges that the company was authorized to do business in this State at all times mentioned in the petition, that it did business by issuing the policies sued on on a given date, whereby it agreed to do certain things, and that plaintiff paid certain premiums and made certain demands of the company which he seeks to have enforced, those allegations, taken with the venue stated in the margin, are sufficient to authorize a holding that the policies are governed by the laws of this State and the contract is to be construed according to its statutes.
3. ———: ———: ———: **Material Error: Must Be Believed to Exist.** Error, to be reversible, must be material, and the court must believe it material. So that, where defendants demurred to plaintiff's petition, charging it did not state a cause of action, and their demurrer being overruled appealed,

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Orthwein v. Germania Life Ins. Co.

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the appellate court cannot reverse the trial court's ruling on the theory that it cannot be determined from the petition whether it is a contract under the laws of this State, if it must guess (1) as to whether it states a contract made and delivered in this State or (2) if made and executed in another State whether the law thereof is the same as Missouri's.

4. ———: ———: ———: **Venue: Impliedly Admitted by Demurrer.** A demurrer to plaintiff's petition by necessary implication admits the insurance policies sued on are governed by the laws of this State, if it charges specifically, by way of confession and avoidance, (1) that a named statute does not apply to the facts and (2) that, if held to apply, it must be brushed aside as unconstitutional.
5. **INSURANCE POLICY: Wife as Beneficiary: Vested Right: Constitutional Statute.** A wife named as beneficiary in a life insurance policy issued on the life of her husband, upon which he alone paid the premiums, has no such vested rights therein as renders unconstitutional a statute which divests her of all interest therein in the event of her death or divorce before the death of the husband; even if spoken of as vested, they are subject to be divested on the condition subsequent. That statute must be read into the policy and become a vitally operative part thereof, as much so as if its very terms were read into it; and it is applicable to all divorced wives and to all insurance policies issued after its enactment. And hence there is nothing in its provisions permitting the husband, who has alone paid all the premiums on a policy issued on his life, to name another beneficiary, in the event of the wife's divorce, that deprives her of her property without due process of law, or denies her the equal protection of the laws, or authorizes an unreasonable seizure of her property, or its taking for a private use, or violates any constitutional provision against special or class legislation.
6. ———: **Freedom of Contract.** Freedom to contract as one pleases is not an element of the life insurance business; on the contrary, the right to make insurance contracts is subject to statutory regulation.
7. ———: **Wife as Beneficiary: Change: Divorce for Husband's Fault.** Sec. 6944, R. S. 1909, authorizing the husband to designate another beneficiary in a life insurance policy, issued on his life for the benefit of his wife and paid for by him alone, "in the event of the death or divorce of the wife before the decease of the husband," entitled him to designate another beneficiary whether he or she was found to be the injured party in the suit for divorce, and whether it was brought by him or her. The right is vouchsafed to the husband without regard

as to who was adjudged to be at fault in the divorce proceeding, and the statute violates no vested right of the wife, and is constitutional.

8. ———: ———: ———: ———. The word "divorcement" used in the statute, means "divorce," and does not imply affirmative action by the husband alone. No other significance is to be given it. Even if it be true that in a Biblical sense the word "divorcement" primarily implied affirmative action by the husband, that fact would have no tendency to prove the word was used in a Biblical sense by the General Assembly when inserted in section 6944.
9. **STATUTES: Construction: Unambiguous.** A plain and unambiguous statute stands on its own reason, and when it is plain and unambiguous courts are not allowed to vary, enlarge or reduce it, or read into it any exceptions or restrictions, or seek for any fanciful public hurts its enforcement may induce, because of speculative theories of their own or apprehension of others.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

**AFFIRMED.**

*Fidelio C. Sharp* and *Henry H. Oberschelp* for appellants.

(1) Plaintiff has not stated a cause of action unless the allegations of the petition are sufficient for reliance on section 6944, Revised Statutes 1909. *Blum v. Ins. Co.*, 197 Mo. 513. (2) The Missouri statutes have no extra-territorial effect. The petition is silent as to where the policies were executed or delivered, and contains no allegations to show the policies were governed by any of the laws or statutes of Missouri. For aught appearing, the policies were executed in New York or some other State or country, and were subject to the laws of some other State or country. In that event no Missouri law or statute would apply. *Hewitt v. Harney*, 46 Mo. 371; *Hilburn v. Ins. Co.*, 129 Mo. App. 670. (3) Even if the policies were

Missouri contracts and governed by the laws of Missouri, still there would be no cause of action. As the divorce was rendered in favor of the wife against the husband, the statute does not apply, that not being a "divorcement of the wife" as the term is therein used. Sec. 6944, R. S. 1909; Funk & Wagnall's New Standard Dictionary (1913), subject, Divorce, 3, 4; R. S. 1909, secs. 359, 2370. (4) "Again, another guide to the meaning of the statute is found in the evil which it is designed to remedy." It should be restricted to that, and not create new evils. Church v. United States, 143 U. S. 463; Blum v. Ins. Co., 197 Mo. 528; U. S. Cas. Co. v. Kacer, 169 Mo. 313; Westerman v. Supreme Lodge, 196 Mo. 711; Rose v. Ins. Co., 153 Mo. App. 97; Perry v. Strawbridge, 209 Mo. 632. (5) Even though the statute by its strict letter be applicable to this case, which we deny, yet it will be construed in the "light of reason." The spirit will prevail. Perry v. Strawbridge, 209 Mo. 621; Church v. United States, 143 U. S. 457; Oil Co. v. United States, 221 U. S. 1; Black on Interpretation of Laws (2 Ed.), secs. 29, 30. (6) Legislators as well as judges have always been regardful of the rights of women. No one can read the numerous acts of the Legislature from the first to the last, without being convinced beyond question that it has ever been the policy of this State to see that the innocent wife on divorcing her husband for his fault, lose none of her rights or property, but to retain all, to continue to hold the husband liable for her support, and under no circumstances to allow the guilty husband to gain an advantage by the divorce. This section must be construed *in pari materia* with those statutes, and in harmony with that settled policy. Saunders v. Saunders, 144 Mo. 494; Westerman v. Supreme Lodge, 196 Mo. 731; R. S. 1909, secs. 359, 2375, 2378. (7) If said Act of 1899 (now sec. 6944, R. S. 1909) is construed to apply to this case, divorce granted wife for

husband's fault, and to authorize a decree in favor of plaintiff, then it is unconstitutional and void, and in violation of the fourteenth amendment to the United States Constitution, in denying to this defendant, Geneva Leota Orthwein, the equal protection of the laws: First, by making an unjust and unreasonable distinction and discrimination in penalizing innocent wives, and favoring, encouraging and rewarding offending husbands for their wrongs; second, by depriving a wife, even if innocent, of her rights and property as a beneficiary in a full-paid policy on her husband's life, yet continuing to allow the husband, even if guilty, to retain his interest as a beneficiary in a policy on her life; and third, by allowing a guilty husband, in case of divorce granted to the wife for his fault, both to retain his interest and ownership of a policy on the wife's life in the husband's favor and also to become the owner of the policy on his life which had been in favor of the wife, while the innocent wife, by such a divorce, loses her vested interest in a policy on her husband's life in her favor, and gets nothing, he retaining his absolute interest in a policy on her life in his favor. Fourteenth Amendment to U. S. Constitution; Cooley's Constitutional Limitations (7 Ed.), p. 561; Sutherland, Notes on U. S. Constitution, p. 733; Muller v. Oregon, 208 U. S. 418; Ritchie v. Wayman, 244 Ill. 509; State ex rel. v. Miller, 100 Mo. 439; Railroad v. Greene, 216 U. S. 417. (8) For the same reasons if the act is held applicable to this case, then it is in violation of section 53 of article 4 of the Constitution of Missouri, in that it is class and special legislation in favor of guilty husbands and against innocent wives, without any right or reason therefor. State ex rel. v. Miller, 100 Mo. 448. (9) If the act is held to apply to this case, then it is in violation of the fourteenth amendment to the United States Constitution in that it deprives this defendant of her property without due process of law,

in that upon the granting of a divorce in favor of the innocent wife and against the guilty husband for his wrong, property absolutely vested in the wife, paid-up insurance policies in her favor on her husband's life, is taken away from her and given to the guilty husband. *Ritchie v. Illinois*, 155 Ill. 108; *State v. Julow*, 129 Mo. 163.

*William R. Orthwein and Fred H. Bacon* for respondent.

(1) The venue of the case at caption applies to all the facts alleged. *Sec. 1823, R. S. 1909; Benton v. Brown*, 1 Mo. 393; *Burnes v. Burnes*, 61 Mo. App. 618; *Palmer v. Railroad*, 76 Mo. 217. (2) When the place of making contract is not alleged in the body of the petition, or even where it is alleged that the contract was made in a different State than where the suit is brought, and the law of such State is not properly pleaded and proven, then the court will presume that the law of any such other State is the same as our law and the law of the forum controls. The Missouri law therefore applies to this case. *Flato v. Mulhall*, 72 Mo. 522; *Matthews v. Railroad*, 219 Mo. 550; *Wyeth Co. v. Lang*, 54 Mo. App. 147; *Waite v. Bartlett*, 53 Mo. App. 381; *Law v. Crawford*, 67 Mo. App. 154; *Stephen on Pleading* (9 Am. Ed.), chap. 281; 22 *Ency. Pl. & Pr.* 788, note 5, 812, note 1. (3) Appellant herself relies on *Sec. 6944, R. S. 1909*, to sustain her appeal. If the Missouri law does not apply, then the above section would not apply to appellants' side of this case. *Blum v. Ins. Co.*, 197 Mo. 513; *Haven v. Ins. Co.*, 149 Mo. App. 291. (4) Appellant's constitutional defenses are not well taken. Any vested interest appellant claims in policies sued on is by virtue of *Sec. 6944, R. S. 1909*, which said section also contains the proviso allowing the husband to change the beneficiary in case of death or divorce-



ment. The statute must stand or fall as a whole, and appellant cannot claim the benefits of one part and contend that the other half is unconstitutional. Sec. 6944, R. S. 1909; *Blum v. Ins. Co.*, 197 Mo. 513. (5) The purpose of the enactment of statutes taking away from the husband the right to assign the policy, or in any way interfere with it, was to protect the wife, so that in case she survives him, the proceeds might go to her free from his creditors. *Insurance Co. v. Brant*, 47 Mo. 419; *Pollitz v. Robinson*, 72 Mo. 201; *Reilly v. Hickcox*, 72 Mo. App. 617. (6) Section 6944, above cited, in an exemption statute, must be construed liberally and does not deprive appellant Orthwein of any vested right, but merely reserves in the second paragraph of the statute certain rights to the husband which he had prior to its enactment, and part of which, the first paragraph, deprives him of, and is directly in line with the New York statute. *Kittel v. Domeyer*, 175 N. Y. 205; *Wanchaaf v. Masonic Mutual*, 41 Mo. App. 206. (7) The statutes of the State of Missouri, regulating the business of life insurance, form part of the policies referred to in the petition, the same as recited therein at length. Appellant Orthwein's interest was always subject to the reservations in this statute and was subject likewise to the reservations in the policies, as appears in the petition, such as the cancelling of said policy for its cash surrender value, by the husband. *Ins. Co. v. Cravens*, 178 U. S. 389; *Cravens v. Ins. Co.*, 148 Mo. 583; *Kern v. Supreme Council*, 167 Mo. 471. (8) The statutes being part of the policies at the time they were written, the right to change the beneficiary was the same as if reserved in the policy itself. Section 6944 merely does away with the necessity of inserting the reservation in the policy itself, in case of death or divorcement. *Robinson v. Ins. Co.*, 168 Mo. App. 259; *Waring v. Wilcox*, 8 Cal. App. 317; *Equitable Life Assn. Soc. v. Stough*, 45 Ind. App. 411. (9) The

only possible interpretation of section 6944 shows that the section meant that the husband should have the right to change the beneficiary regardless of who got the divorce. *Haven v. Ins. Co.*, 149 Mo. App. 291; *U. S. Casualty v. Kacer*, 169 Mo. 315. Under the definition of word "divorcement:" *Murray's English Oxford, Century, Standard and Webster's Dictionaries*; *March's Thesaurus*.

LAMM, C. J.—Defendants unsuccessfully demurred to a second amended petition, and (standing on their demurrer, refusing to plead over and suffering judgment on the merits) appealed.

Appellant insurance company joining in the appeal but not in the abstract and brief, we assume it stands indifferent and neutral between plaintiff and its co-defendant. As it has to respond in any event, an adjudication vesting title to the policy fund in one or the other protects it.

The caption of the amended petition (said to be of significance on a question presently dealt with) runs: "State of Missouri, City of St. Louis, ss. In the Circuit Court, City of St. Louis." Next follows the names of the parties plaintiff and defendant. The petition reads:

"For cause of action by way of amended petition and by leave of court, plaintiff states that the defendant, the Germania Life Insurance Company of the city of New York is, and was at all the times hereinafter stated, a corporation under the laws of the State of New York engaged in the business of life insurance and duly authorized to do business as such in the State of Missouri.

"Plaintiff states that heretofore, to-wit, on the 20th day of June, 1900, he procured to be issued a policy of insurance on his life by defendant Germania Life Insurance Company for the sum of ten thousand

dollars, said policy being number 213,368, and dated June 20, 1900, the annual premium on which was two hundred and seventy-six dollars. Said policy provided that upon the death of plaintiff the said defendant company would pay the sum of ten thousand dollars to the then wife of plaintiff, defendant Geneva Leota Orthwein, for her sole use, if living at the time of his death, or in case of her previous death to the executors, administrators or assigns of plaintiff. It was also agreed in said policy that if it should lapse as to its original amount by nonpayment of premium after it should have been three years or more in force, it should remain valid, subject to all its conditions, for as many twentieths of the amount of said policy as there should have been whole years' premiums paid.

“Plaintiff further states that heretofore, to-wit, on the 20th day of June, 1900, he procured to be issued by the defendant Germania Life Insurance Company another certain policy of insurance upon his life for the sum of twenty thousand dollars, the annual premium on which was the sum of five hundred and fifty-two dollars; said policy is dated June 20, 1900, and is numbered 213,367, whereby said insurance company promised and agreed, upon due notice and proof of the death of plaintiff, to pay the sum of twenty thousand dollars to the then wife of plaintiff, defendant Geneva Leota Orthwein, for her sole use, if living at the time of his death, or in case of her previous death, to the executors, administrators or assigns of plaintiff. It was also agreed in and by said policy that if it should lapse as to its original amount by nonpayment of premium after it should have been three years or more in force it should remain valid, subject to all its conditions, for as many twentieths of the amount of said policy as there should have been whole years' premiums paid.

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“Plaintiff states that upon the first mentioned policy of insurance he paid the first and, to-wit, five subsequent annual premiums, amounting in all to the sum of \$1656, and on the second mentioned policy aforesaid he paid the first annual premium and, to-wit, five subsequent annual premiums, the total amount so paid being \$3312, and the total amount of premiums paid on both the said policies amounting to the sum of \$4968.

“Plaintiff states that no part of said premiums was paid by defendant Geneva Leota Orthwein, and that said policies have at all times since the issue thereof remained in the sole possession of plaintiff, and are now in his possession.

“Plaintiff states that heretofore, to-wit, on the 10th day of July, 1907, upon application of defendant Geneva Leota Orthwein, suing under the name of Neva L. Orthwein, plaintiff and said defendant Geneva Leota Orthwein were duly divorced by the circuit court of Lawrence county, Missouri, and upon the entry of said decree of divorce, said Geneva Leota Orthwein ceased to be the wife of plaintiff. Plaintiff did not appear in said cause and made no defense.

“Plaintiff states that the said policies were made payable as aforesaid without any consideration moving from said defendant Geneva Leota Orthwein to plaintiff. That he has demanded of said defendant Germania Life Insurance Company that it change the beneficiary in each of said policies to his estate and recognize plaintiff as the sole owner of said policies, or to cancel the same and issue others in their place, or to accept a surrender of said policies from plaintiff for the stipulated surrender value, all of which said Germania Life Insurance Company has refused to do, unless said Geneva Leota Orthwein will execute a release or assignment of said policies to him. That the said policies are and always have been the property of plaintiff; that he has demanded of said defendant

Geneva Leota Orthwein that she release the said policies to him or release any claim which she might have thereon, because of being named as beneficiary therein, but she has refused to execute any such release.

"Wherefore, plaintiff prays that by decree of this court he may be adjudged to be the sole owner of said policies and that the name of the beneficiary in each of said policies be changed to his estate and that said defendant Geneva Leota Orthwein has no claim or interest therein; that said Germania Life Insurance Company recognize plaintiff as the sole owner of said policies, and obey the direction of plaintiff as to the disposition of the same.

"And plaintiff prays for all such other and further relief to which it may be entitled the premises considered."

The demurrer challenged the petition, for that:

(a) It did not state facts sufficient to constitute a cause of action.

(b) On the hypothesis that the petition counts on section 6944, Revised Statutes 1909, as applicable and controlling, then the demurrer challenges the application of that section in the first instance; and in the second instance challenges its constitutionality, in that:

*First.* It violates the 14th Amendment of the U. S. Constitution by depriving defendant Geneva of her property without due process of law and denies to her the equal protection of the laws.

*Second.* It violates section 30, article 2, of the Constitution of Missouri by depriving said Geneva of her property without due process of law.

*Third.* It violates section 11, article 2, of the same Constitution by an unreasonable seizure of Geneva's property without any wrong on her part.

*Fourth.* It violates section 20 of the same article by taking the property of Geneva for private use.

This "taking" is explained by the demurrer to be that "the guilty husband by wronging his wife so that she divorces him, can appropriate to his own use what has theretofore been the sole and absolute property of the wife and in which he had theretofore no interest whatever."

*Fifth.* It violates section 53, article 4, of the Constitution as special and class legislation in favor of "guilty husbands without any risk or reason therefor."

While the blunt question is: Is the petition good on demurrer? yet, as seen in the demurrer, it splits itself into ramifications and is approached in appellants' brief from sundry angles. The statute noticed in the demurrer reads:

"Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of the wife of the insured, shall inure to her separate benefit, independently of the creditors, executors and administrators of the husband: Provided, however, that in the event of the death or divorcement of the wife before the decease of the husband, he shall have the right to designate another beneficiary, upon written notice to the company, but such notice shall not be effected, unless indorsed upon the policy by the president or vice-president and secretary of the company issuing the policy. But when the premiums paid in any year out of the funds or property of the husband shall exceed the sum of five hundred dollars, such exemptions from such claims shall not apply to so much of said premiums so paid as shall be in excess of five hundred dollars, but such excess shall inure to the benefit of his creditors."

Other statutes drawn within the lines of the discussion will be noted in due course. We are of opinion the demurrer was well ruled. Because:

(1) The first proposition advanced is that the petition states no cause of action for that it is silent on *where* the policies were executed or delivered. It is contended that it contains no allegations showing the policies were governed by the laws of this State, hence (counsel say) as our statutes have no extra-territorial force, it bears a fatal vice on its face.

Pleading:  
Venue:  
Insurance  
Policy.

The proposition, at best uncommonly subtle, is novel and we think unsound for the following reasons:

Allegations of pleadings must be liberally construed with a view to substantial justice. [R. S. 1909, sec. 1831.] Now, at a very early day it was ruled "that where there is a venue laid in the margin of the declaration, or in the commencement, that shall be the venue for all other matters (requiring a venue, but having none special) contained in the declaration." [Benton v. Brown, 1 Mo. 393.] So, too, the statute prescribes that the venue shall be laid in the margin of the petition. [R. S. 1909, sec. 1823.] So far as we stand advised, the point in hand has never been made since Benton v. Brown was ruled. Maybe up to this time, it was abandoned as unprofitable after that decision. At any rate, if the petition is measured by the rule laid down in the Benton-Brown case, it is well enough; for it alleges that defendant insurance company was authorized to do business in the State of Missouri at all times mentioned in the petition. It next states that it did business by issuing two insurance policies on a given date whereby it agreed to certain things; that plaintiff paid on the policies certain premiums and made certain demands on the company. Under the Benton-Brown rule the venue (the *locus in quo*) of all those things is laid in the State of Missouri by virtue of laying the venue once in the margin. The word "venue," as used in statutes and legal exposition, is elastic and broad enough in meaning to include not only the county in which

an action is brought, but the place in which a fact happened. [Black's L. Dict. (2 Ed.), tit. "venue."]

Not only so, but by necessary implication the demurrer admits the policies are governed by the laws of the State of Missouri in force at the time unless certain things are true. This follows from the fact that it goes on to allege specifically (by way of confession and avoidance), first, that a named statute does not apply to the facts; second, that if held to apply then it must be brushed aside as unconstitutional.

Moreover, look at the matter from another viewpoint: Error, to be reversible, must materially affect the merits of the action and we must "believe" that is so. [R. S. 1909, sec. 2082.] This appeal is taken from a judgment on the merits, one rendered in a court of general jurisdiction—a court presumed to proceed by right and not by wrong. As prescribed by the statute just cited, if we reverse it we must do so because we *believe* the merits are materially affected. Are we asked by appellants to do that (to-wit, act on our *belief*) on the contention we are considering? Not at all. We are asked to reverse the judgment on one of two *guesses*: First, that the policies were New York contracts in spite of the fact that the company was doing business in Missouri. Why should we guess that way, or guess at all, when the lawmaker prescribes (not that we must guess, but) that we must believe?

Again, in those States carved out of what was once British territory the common law is presumed to obtain. In those States carved out of territory acquired from Mexico, France or Spain the common law (absent a showing *contra*) is not presumed to obtain. In this condition of things appellants put us in the pickle of having "another guess coming," to-wit, a guess that the policies are contracts of some State carved out of what was once British territory



where the common law is presumed to be in force; for, observe, if the policies were contracts of a State carved out of other than British territory, then, absent a showing as to what the pertinent statutes were, as here, the court was authorized to apply our own laws to the policies. [Mathieson v. Railroad, 219 Mo. l. c. 550 et seq.; Thompson v. Railroad, 243 Mo. l. c. 349.] In that view of it, we decline to make that guess also.

Speaking of guessing there is an amusing delusion abroad in the land to the effect that guessing is a working tool in administering law. It is now and then loosely (and jocosely) said, for example, that an appellate court has the *last* guess at the law, implying thereby, that the trial court has the *first*, and that each do it. Alas! how often must wisdom cry aloud in the streets and proclaim it from the house-tops that the law is the perfection of reason! If guesses were allowed, then in the "bright lexicon" of jurisprudence "there would be no such word as" reason. Peradventure, too, if guesses were horses, every judge would gaily ride, and—but enough of that.

We rule the point against appellants.

(2) It would, we think, be to involve ourselves in what Sir Frederick Pollock once termed "a perpetual flux of speculative ideas" to see in the statute *supra* (Sec. 6944, R. S. 1909) anything depriving defendant Geneva of her property without due process of law, or anything denying to her the equal protection of the law, or any unreasonable seizure of her property, or any taking of the same for private use, in a constitutional sense, or any violation of the constitutional provision against special or class legislation. We will presently come to a construction of that statute as well as to a determination of the question whether it applies to this case. For the present, on the several contentions that it flies in the face of the Federal or State Constitutions in the particulars

mentioned, it is sufficient to say that we perceive no substance in them. The statute does not interfere with the vested rights of Geneva. In strictness, to be *vested* a right must be "fixed, accrued, absolute." [Bl. L. Dict. (2 Ed.), tit. "vested."] There may be, of course, a present fixed right of future enjoyment and that would be a vested right, and there may be rights so vested as to be subject to divestiture. In policies of insurance on the life of her husband in her favor, *which he took out after the enactment of that statute*, and on which the premiums are paid solely by him, she has rights but no *vested* ones in a strict legal sense. *Contra*, her rights are either contingent on the absence of her death or divorce and on his naming a new beneficiary after either event; or, if spoken of as vested, they are subject to be divested on condition subsequent. According to all acceptable doctrine that statute must be read into the policies and become a speaking and vitally operative part thereof. [Cravens v. N. Y. Life Ins. Co., 148 Mo. 583.] Suppose, to illustrate, the policy actually read that in case of the death or divorce of the wife the husband could name another beneficiary. What legal infirmity would attend that provision? Yet if the statute be read into the policy and became an integral part of it, the result is precisely the same as if the provision was originally a policy term. There is an imperative implied call for it and the policy is rounded into certainty by the maxim: *Id certum est quod certum reddi potest*.

The foregoing pronouncement is steadied and fortified by another view, to-wit, freedom to contract as one pleases is not an element of the life insurance business, but it is uniformly held (on the solidest grounds of public policy) that the right to make insurance contracts is subject to statutory regulation. [Dezell v. Fidelity, etc. Co., 176 Mo. l. c. 266; Burr ridge v. Ins. Co., 211 Mo. l. c. 172-3, 180.] So, we say again

that with that statute read (as it must be) into policies coming into existence after its enactment, as here, Geneva took under and subject to the terms of the statute and not otherwise, and we see no place where due process of law is denied her, or where she can complain of an unreasonable seizure of her property, or the taking of her property for private use. So, the statute being on its very face a general one, applicable to all divorced wives and to all insurance policies issued under like conditions, we fail to see how it is justly open to the criticism that it denies equal protection of the law to her or that it is special legislation. A careful study of appellants' brief and the authorities cited therein to sustain the views advanced, has not led to the conclusion that those views are sound or that the subject justifies extended exposition. The stiff and chief rule is that before a statute can be held unconstitutional there must be no two ways about it. Its infirmity must appear beyond any reasonable doubt. A strong presumption of its validity exists and it reposes in the friendly bosom of that presumption until such time as it is made to appear (after caution and full consideration) that its unconstitutionality is made out in accordance with stringent rules in that behalf. [Board of Commissioners v. Peter, 253 Mo. 1. c. 530.]

Some other theories advanced apply as well to remaining questions and will receive attention presently.

We rule constitutional points against appellants.

(3) It is argued the statute quoted does not apply. It is a bit difficult to delimitate by metes and bounds the theories advanced in this behalf. We are inclined to the notion that they relate somewhat to the interpretation of the statute, a question we take next. But attending to the point, why does the statute not apply? If it does not apply what one does apply? Appellants put their finger on no other. To

get the right perspective let us take a glance at a group of statutes. By section 6941 a married woman may insure the life of her husband in her own name or in the name of a third person for her benefit and in case she survive him, the policy sum becoming due is payable to her use free from the claims of the representatives of the husband or of any of his creditors, provided the premiums on such policy shall have been paid by her out of her funds or property. That statute does not fit the facts of this case as set forth in the petition. By the next section of the insurance act (Art. 2, sec. 6942) the lawmaker directs that if the wife die before the husband the policy sum shall be payable to her heirs, etc., unless otherwise stipulated in the policy. It would seem that sections 6941 and 6942 relate to the same subject-matter. The next section, 6943, provides a scheme whereby an unmarried woman may insure in her own name or in the name of a third person the life of her father or brother for her sole use. That statute does not apply. The next section is the one in question. There was a statute, somewhat relating to the subject-matter, in existence in 1889 (R. S. 1889, sec. 5854) and which was brought forward as live law from former revisions. But in 1899, section 5854, *supra*, was made over and enacted practically as a new statute (Sec. 7895) with substantially new provisions and with old ones eliminated or modified. It now appears in the 1909 revision as section 6944. As already said, it was in force several years before the policies in this case were issued. Mrs. Orthwein did not insure or cause to be insured the life of her husband, nor did she pay the premiums. Hence, as said, she can claim nothing under section 6941. To the contrary, the allegations of the petition, without naming section 6944, bring the facts precisely within the purview of that section. Hence, the point made that the statute does not apply is without merit.

In leaving the point another observation is not amiss. If the statute applies, as we have just held, then Geneva is put in a strait betwixt two, to-wit, she asserts her rights under a statute which she complains of as unconstitutional in the same breath. As a general rule that may not be done. [State ex rel. v. McIntosh, 205 Mo. l. c. 607 et seq.] Must she not take the bitter with the sweet and stand on the whole law if on any interdependent part of it? If the statute permit her husband to withdraw the premiums from his creditors and encourages her husband to take out policies of insurance in her favor subject to the condition and with the proviso that he may name a beneficiary in case of her divorce or death, may she take the benefit of the law with one hand and repudiate its burdens with the other? The question whether the proviso (which contains the right to change the beneficiary on the death or divorcement of the wife) is such interdependent part of the section that the latter must stand or fall as an entirety is not argued in briefs and as it is not necessary to our case, we pass it by.

(4) Appellants with animation maintain the proposition that the proviso does not cover the case at bar, to-wit, a case where the wife obtains a divorce as the innocent and injured party. They insist that the reason of the thing is the other way, hence it must be ruled that the lawmaker intended his law to cover only a case where the husband procured the divorce and the wife was the guilty party. The identical question was put to this court in 1906 in *Blum v. Insurance Co.*, 197 Mo. 513 (*vide* pp. 520-1), and was set to one side as not necessary to a decision, since that case broke on other points (p. 531). Four years subsequently the question was presented to the Springfield Court of Appeals in *Haven v. Insurance Co.*, 149 Mo. App. 291, and was ruled against the present contention of appellants. We are asked to explode the

doctrine of that case but decline to do so; for we think it soundly ruled, having regard to those two instruments which Coke says impugn or confirm all things, to-wit, reason and authority.

That learned court ruled that the word "divorcement" and the word "divorce" have an equivalent meaning in good usage, to-wit, the dissolution of the marriage tie, and that this meaning is wholly distinct from the question of who was in fault in bringing about the dissolution. It held that such meaning must be attached to the word unless the purpose to be attained by the enactment required a different meaning. It then proceeded to consider the purpose of the law, the mischief to be remedied, the purpose of the particular form of insurance involved, the state of the law at the time of the enactment, the question whether the wife had a vested right in the policy fund or such form of policy issued after the enactment in question, and the public policy to be observed and preserved, the fact that unless the husband could change the beneficiary on the divorce of his wife a policy on his life would likely lapse for nonpayment of premiums on his part, the fact that unless he could change the beneficiary the policy fund would be diverted from those he was under a moral duty to provide for (for example, children, etc.) to the one he was no longer under a moral duty to provide for on his death—finally summing up as follows:

"Our conclusion is that the purpose underlying this statute is to vouchsafe to the husband without regard to who was in fault in the divorce proceedings the same freedom of action in providing for those whom he might be under some moral obligation to provide for after his death that he would have had if the marriage relation had never existed between him and the defendant Pearl L. Haven. The purpose underlying all contracts of life insurance where the policy is secured and the premiums paid by the insured

is to provide for those dependent upon him after his death and when the divorce between him and his wife was granted he would no longer feel the obligation to provide for her resting upon him, and for this reason we think the intention of the Legislature was to leave him unhampered when in that condition to provide another beneficiary for whose benefit he would be willing to continue the payment of the premiums and thus keep the policy alive."

It is possible appellants' brief in the instant case approaches the question from one or another angle not considered by the Court of Appeals in the Haven case. If it were not for that possibility we would close the case at this point by adopting the reasoning and conclusions of our brethren of the Springfield Court of Appeals as the be-all and end-all of the matter.

Attending to that phase of it, it is argued that the word *divorcement* primarily involves the concept of affirmative action by the husband. If that view be adopted, then the next step in the evolution of the argument is that it means he must procure the divorce because of the fault of the wife. The argument is one no little elusive and refined, harking back to and taking root in extreme antiquity. We are referred to Deut. 24:1-3 which provides that if a man's wife find no favor in his eyes because of some "uncleanness in her," then he should "write her a bill of divorcement and give it in her hand." Approaching the matter with diffidence and disposing of it with modesty (for do we not speak to a bar learned on the subject?) we make these observations: It may be conceded to appellants that the particular bill of divorcement referred to by Moses was the affirmative act of the husband, therefore involved action on his part and some "uncleanness" in her; but we pause to ask: Could a wife divorce her husband at all under the laws of Moses? Bishop says that was a power lodged

with the husband (1 Bish. Mar., Div. and Sep., sec. 54) and could be exercised "pretty much or entirely at pleasure." In that view of it the word certainly involved "action" by the husband. Why so? Because the action was masculine and masculine alone in that era among the Jews. However that be, the mere fact that the word *divorcement* was used by Biblical translators has no tendency to prove it was used in a Biblical sense by the General Assembly in enacting section 6944. Maybe so, maybe no. Let him speak who knows, not I. Nor are we cited to any authority showing that the word in modern usage involves action by the husband—admitting it did so in Bible times. This because: When the race was young, speaking in a colloquial and not a scientific sense, divorces were acts of the parties, not of courts. Divorce seems to have been a mere personal equation and in nowise involved a public policy or a status. The husband could "put away his wife" under the oldest code in the world, that of Hammurabi, B. C. 2285-2242, sec. 137 et seq. In that code there was a rudimentary regulation in regard to the return of the wife's "dowry," if she was put away, and, if she brought no dowry, he was to give her "one mina of silver for a divorce." [Sec. 139.]

(*Nota bene*: One mina of silver equalled fifty shekels; and one shekel, seventy-two and one-half cents, from which the cost of a divorce in Babylon, absent a *dot*, may be figured by the curious—if worth while.)

The duty of a husband to give his wife a "writing of divorcement" when he put her away seems to have been understood as an ancient Jewish custom by a mere reference to the fact. [Matt. 5:31; Matt. 19:7 et seq.; Luke 16:18; 1 Cor. 7:10-12.] In one of these references the right to put away the wife is said to have been allowed by Moses because of the "hardness of your hearts." The same right gentlemen had, to-



wit, that of putting away their wives, obtained in the pagan Roman Empire, but it seems also that the world had progressed to the point where it conceded the right to ladies, too. They could "put away" their husbands, the divorce being "pretty much at the pleasure of either of the parties." [1 Bish. Mar., Div. and Sep., sec. 85.] Does not everyone know that the greatest of Roman orators put Terentia, his wife, away and gave her a divorcement, because she tightened her purse strings on his call for money (she being rich and frugal and he somewhat of a spend-thrift with elegant tastes)? We dismiss this bit of old gossip with the suggestion that when Cicero's head was nailed to the rostra by Antony, and Fulvia, said Antony's wife, thrust a hairpin through his dead tongue, we do not know that feminine thrust was because of his treatment of Terentia (for Fulvia, as former widow of Clodius, had private grievances of her own against his tongue); but we do know there was even then a public sentiment against a divorce by the act of the husband, a public sentiment which, crystallizing in the flux of time into law, centuries ago made a divorcement no longer a private rescission of a contract, but the solemn judgment of a court on a status involving social order and public morals. It is too far a cry to go back to Deuteronomy and exploded conditions for proof that the word *divorcement* involves the affirmative action of the husband. Its form is a little unusual, but its meaning is self-evident. It is plain enough that when either party gets a divorce both are divorced and the status existing after the separation is a divorcement and properly termed such. In that sense it is as much his as hers.

It is argued that we should read into the statute the idea of innocence in the husband and guilt in the wife, before the husband should be rewarded by the right to change the beneficiary in a policy on his life, taken and kept up by him. One answer to that is

that the lawmaker could have said so with one stroke of his pen and did not make that stroke. Why should we do for him what he declined to do for himself, when our function is to interpret and declare and not make the law? Another answer is that, when a law is plain and unambiguous in terms, we are not allowed to vary, enlarge or reduce it because of speculative theories of our own. *Ita lex scripta est* is the maxim in that behalf. A plain and unambiguous statute stands on its own reason, and this is a statute of that character. If, however, we were put to it to assign reasons for the statute, more than one suggest themselves. For instance, speaking to support, in the statute on divorce is ample provision for the allowance of alimony out of the husband's estate in accordance with the means of the guilty husband to give and the right of the innocent wife to receive.

Moreover, would not a sufficient reason be (I mean reason for not interpreting the statute in accordance with appellants' view) that the statute is one intended to induce the taking out of policies and making provisions for wives who remain wives until such time as they become widows. To that end it gives the husband power to divert the policy sum in case the wife does not become such widow, to-wit, in case of her death or divorcement. Would not appellants' view not only clog the purpose but overlook the motive of the law? Nay, would it not be unjust and immoral for the lawmaker to say to all men: "If you will insure your lives in your wives' favor and pay the premiums yourselves, I promise you you can change the beneficiaries by making new appointees in case of their death or divorcement." and then face about (through judicial interpretation) and say to one of these men who acted on the law: "The law meant to say, in case of her death or your procuring a divorce from her because she was guilty of a breach of the

*marriage contract?*” Courts should not torture or twist the statute into a device for obtaining property by false pretenses, or, what amounts to the same thing, by making of it the studied duplicity of some Delphian oracular utterance.

Again, it is argued that if the guilty husband be allowed the right to change the beneficiary, it would operate as an inducement to bad men to mistreat their wives so that they would (here notice a tang of something like contributory negligence or cooperation in the wife) obtain divorces, and all this in order that when they obtained them, the said husbands could change the beneficiaries in insurance policies. Is such argument not a happy conceit that amuses but does not convince? If of any force, should it not be directed to the Legislature and not to this court? Might one not as well argue that if husbands could *not* change the beneficiaries it would be an inducement to designing women to get divorces from those husbands carrying large policies in their favor in order to enjoy the use of such accumulations by cashing in their policies and all this in addition to alimony? We cannot well abrogate or alter provisions of law on such fanciful hypotheses.

We have pursued the matter farther than intended. Let the judgment be affirmed. It is so ordered.

PER CURIAM.—This cause coming into Banc from division on a dissent, on hearing there the divisional opinion by LAMM, C. J., is adopted as the opinion of the court. All concur, except *Bond, J.*, who dissents.

WERTHEIMER-SWARTZ SHOE COMPANY et al.  
v. CLEVIE H. WYBLE et al., Appellants.

In Banc, November 17, 1914.

1. **APPEAL: No Bill of Exceptions: Record Proper: Sufficiency of Petition.** Although the bill of exceptions was filed too late, and accordingly only the record proper can be considered by the Supreme Court on appeal, still the sufficiency of the petition is a proper subject of inquiry.
2. **FRAUDULENT CONVEYANCE: Avoiding Deed from Third Person to Debtor's Wife: Execution Sale: Combination: Inadequate Price: Equity.** Plaintiffs' petition states, that R traded his stock of goods and his note for \$2500, which he afterwards paid, for a hundred acres of land the title to which was taken in his wife; that the conveyance of the land was made in fraud of plaintiffs as creditors of R; that plaintiffs separately sued him in attachment and the writs were levied and the abstracts filed; that R made default and judgments were taken against him, under one of which execution was levied and the land sold for \$3 to L as trustee for plaintiffs, the execution being returned unsatisfied; that afterward R and his wife without consideration conveyed the land to defendant W in fraud of creditors, so that W became trustee for the plaintiffs; and that W in turn gave a purported deed of trust to defendant bank without consideration and likewise in fraud of creditors. The prayer asks that the original conveyance to R's wife, the conveyance to W, and the deed of trust be held fraudulent and void, and asks also for general relief. The decree held the conveyances fraudulent and void as against the sheriff's execution deed to plaintiffs—a conveyance not mentioned in the petition. *Held*, that the inadequacy of the price paid at the execution sale, in connection with the combination which by interposition of the trustee brought it about, rendered the sale feigned and colorable, and amounted to a fraud against R, the debtor, and accordingly the judgment must be reversed and the cause remanded. [Only BROWN, WALKER, and WOODSON, JJ., concur in the opinion in this case: LAMM, C. J., and FARIS, J., concur in the result, while GRAVES and BOND, JJ., dissent.]

Appeal from Pike Circuit Court.—*Hon. David H. Eby*,  
Judge.

REVERSED AND REMANDED.

*Pearson & Pearson and J. H. Blair for appellants.*

(1) The petition does not state facts sufficient to constitute a cause of action. (a) It is not averred that Louis Landau, as trustee, ever paid the purchase price of \$3 and received a deed from the sheriff as execution purchaser. A purchaser at execution sale acquires no title to the real estate until the deed has been executed by the proper officer. But when it is executed it relates back to the date of the sale, and vests title in the execution purchaser from that time as against the execution defendant, and his privies and against strangers purchasing with notice. *Lumber Co. v. Franks*, 156 Mo. 689; *Boyd v. Ellis*, 107 Mo. 395; *Leach v. Koenig*, 55 Mo. 451; *Porter v. Mariner*, 50 Mo. 364; *Strain v. Murphy*, 49 Mo. 337; *Alexander v. Merriy*, 9 Mo. 513; *Davis v. Green*, 102 Mo. 181; *Blodgett v. Perry*, 97 Mo. 275. The petition should have set out the details of the alleged trust in Landau, how created and for what purpose, in order to show that he had the right, under the terms of the trust, to purchase the land. The bald declaration that he purchased as trustee is not sufficient. (c) The petition alleges that the deed from Thomas N. Sanderson's executors to Tillie P. Rettke was fraudulent and void. Assuming that to be true, then the title, certainly the legal title, to the land remains in the heirs of said Thomas N. Sanderson, or the beneficiaries under his will, and they should have been made parties defendant in this cause. And besides, if that deed is fraudulent and void no resulting trust could arise thereunder in favor of plaintiffs, as creditors of Gustavus Rettke, and their petition states no cause of action. (2) There is no equity in the bill. (a) The purchase price of 3 cents per acre for the land which sold a few months prior thereto for \$40 per acre, is so grossly inadequate that a court of equity will not ratify or confirm the transaction. *State v. Elliott*, 114 Mo. App. 562; *Davis v.*

McCann, 143 Mo. 172; Durfee v. Morgan, 57 Mo. 374; Mitchell v. Jones, 59 Mo. 438. (b) The purchase price of 3 cents an acre is so shocking to the conscience, and so grossly inadequate, as to amount to proof *per se* of fraud in the sale. Walter v. Hermann, 99 Mo. 532; Knoop v. Kelsey, 121 Mo. 642; Phillips v. Stewart, 59 Mo. 491; Cobb v. Day, 106 Mo. 300; Railroad v. Brown, 43 Mo. 294; Briant v. Jackson, 99 Mo. 598. (c) Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling a transaction. In such case the relief is granted, not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby. Nelson v. Betts, 21 Mo. App. 231; Kerr on Fraud and Mistake, 161 Pom. Eq., secs. 926, 927; Bisp. Prin. Eq. (5 Ed.), sec. 219. We have not been able to find in the books a case of inadequacy of price as gross and unconscionable as the case at bar. (d) The purchase of the land by Louis Landau, as trustee for his co-plaintiffs, in our opinion, could not have had in view but one purpose, and that the suppression of competition at the execution sale between said co-plaintiffs. At least it had that effect. In the absence of such trust or combination either of those plaintiffs would, in order to protect itself, have bid for the land more than the debt of the other. This is self-evident. Inadequacy of price when unreasonable, is evidence of a secret trust, and is prima-facie evidence that a conveyance is not bona-fide if it is accompanied with any trust. Kuykendall v. McDonald, 15 Mo. 293. It is now the uniform doctrine that any combination at public or private sale, having the effect of preventing competition in bidding, is against the policy of the law and void. Durfee v. Moran, 57 Mo. 374; Hook v. Turner, 22 Mo. 333; Parker v. Railroad, 44 Mo. 415; 17 Am. & Eng. Ency. Law, p. 980; Wooten v. Hinkle, 20 Mo. 290; Hook v. Turner, 22 Mo. 333; Stewart v. Nelson, 25 Mo. 309; Miltenberg

v. Morrison, 39 Mo. 72; Stewart v. Severance, 43 Mo. 322; Durfee v. Moran, 57 Mo. 374; Bailey v. Smock, 61 Mo. 213; Massey v. Young, 73 Mo. 260; Beedle v. Mead, 81 Mo. 297. (3) (a) The court erred in finding and decreeing that the conveyance executed by D. Taylor Sanderson and Robert B. Sanderson, executors of Thomas N. Sanderson, and D. Taylor Sanderson and wife in their own right, to Tillie P. Rettke was fraudulent and void. Creditors can complain only of the fraudulent conveyance of property which is subject to their debts. Burns v. Bangert, 92 Mo. 167. A deed cannot be set aside as fraudulent unless the grantor therein intended thereby to hinder, delay or defraud his own creditors. Parker v. Roberts, 116 Mo. 657. (b) The only right or interest that could have possibly accrued to the plaintiffs by reason of that conveyance was possibly a resulting trust in their favor, if Gustavus Rettke fraudulently applied his own means toward the payment of a part of the purchase price for the land. But the court decrees that deed to be void. That being the case there was no resulting trust, or any other right or interest thereunder accruing to the plaintiffs. The deed being null and void the title remained in the beneficiaries under Thomas N. Sanderson's will, as if the deed had never been made. A void deed is without legal force or effect, ineffectual to bind parties, or to convey or support a right. 29 Am. & Eng. Ency. Law, p. 1065. (c) This is not similar to a case where a person makes a fraudulent deed, and it is set aside. (4) The bill charges only, that the deeds from Thomas N. Sanderson's executors to Tillie P. Rettke, and Tillie P. Rettke to Clevie H. Wyble, and the deed of trust from Clevie H. Wyble and wife to William J. Buchanan, trustee for the Bank of Eolia, are fraudulent and void, and asks that they be so decreed and adjudged. (It does not ask that they be set aside, nor does the court set them aside in direct terms.) The court so decreed and adjudged,

and further, went so far as to decree and adjudge that other conveyances were fraudulent and void which are not covered by, or even mentioned in, the pleading, and concerning which no relief is asked by plaintiffs, and under which Tillie P. Rettke acquired title to the land in controversy. The decree or judgment so rendered by the court is not within the issues made by the pleadings. This is reversible error. *Spindle v. Hyde*, 247 Mo. 32; *Schneider v. Patton*, 175 Mo. 723. While under the prayer for relief a party may have any relief to which he may show himself entitled, such relief must be founded on and consistent with the allegations in the bill and not such as may be proved at the trial. *Roden v. Helm*, 192 Mo. 93; *Ross v. Ross*, 81 Mo. 84; *Reed v. Bott*, 100 Mo. 62; *Irvin v. Chiles*, 28 Mo. 576; *Harris v. Railroad*, 37 Mo. 310; *Newham v. Kenton*, 79 Mo. 382; *McNair v. Biddle*, 8 Mo. 257. A decree cannot be based on facts not set up in the pleadings. *Rumsey v. Railroad*, 144 Mo. 175; *Paddock v. Lance*, 94 Mo. 283; *Muenks v. Bunch*, 90 Mo. 500; *Newham v. Kenton*, 79 Mo. 382; *Baldwin v. Whaley*, 78 Mo. 186.

*Tapley & Fitzgerald* for respondents.

The appellants did not raise the question in the lower court that the petition did not state facts sufficient to constitute a cause of action, either by demurrer or objection to any of the evidence being offered at the trial of the case or by a motion in arrest. When the question is not raised in the lower court, reasonable inference will be indulged in by this court in favor of the petition being sufficient and will be sustained if by fair intendment it impliedly states a cause of action. *Miller v. Klein*, 160 S. W. 562. In this petition everything is stated that is essential. The appellants did not file a Bill of Exceptions, and consequently none of the evidence is before this court and they stand



on the bare record in the case. We think that the case above cited is sufficient. As to the second point: The decree in this case is in accord with the pleadings. Every material fact that is set out in the petition is passed upon by the court. Every fact that is passed upon by the court is referred to in the petition. It has been decided time and time again where a decree is in accord with the pleadings that it is sufficient, and that is all that is necessary as far as the decree is concerned. As far back as the 68 Mo. the courts are found holding to this rule. *Cox v. Estep*, 68 Mo. 110, and on down to the present date. The petition in this cause alleges that Rettke owned the stock of goods; that the plaintiffs sold him goods for his store and brought suit with attachment in aid, obtained judgment and while the judgment lien existed Mrs. Rettke sold and transferred the real estate. The appellants are not in a position to object to the inadequacy of the consideration. They did not come into court and ask that the deed from Gustavus Charles Rettke to Louis Landau, trustee, be set aside and tender the purchase price paid by Louis Landau as trustee, to the sheriff; nor did they offer to pay the indebtedness existing between Gustavus Charles Rettke and the respondents in this case. If they desire to take advantage of the inadequacy of the consideration they should at least tender the purchase price and what Gustavus Charles Rettke owes the respondents herein. The respondents herein have lost their judgment liens by limitation and if the court should hold that the deed from Gustavus Charles Rettke, to Louis Landau, as trustee, is not good by reason of the inadequacy of the consideration, then the respondents have lost their judgment lien by limitation, and as far as their remedy is concerned, by reason of their judgment, is lost by these respondents. *Ames v. Gilmore*, 59 Mo. 539. This proposition is too old and too well settled to cite further authorities.

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Appellants were not taken by surprise for the reason that they bought this land from Rettke at the time it was attached and judgment entered against it by the circuit court in favor of the respondents, and at the time that same was sold respondents held the title. This suit was brought under Sec. 416, R. S. 1899, now Sec. 2344, R. S. 1909. Every allegation as required by said section is set out in the petition. *Mansur & Tebbetts Imp. Co. v. Jones*, 143 Mo. 253. On August 18, 1907, the heirs of Thomas N. Sanderson, for the purpose of correcting title, made a quitclaim deed to Tillie Rettke. This was for the purpose of correcting the title in Tillie P. Rettke and if any title was thus passed it related back to the time when the title was passed to Tillie P. Rettke from the executors. When the executors executed the deed to Tillie P. Rettke, D. Taylor Sanderson owned an undivided one-half interest in said real estate and the estate of Thomas N. Sanderson owned the other undivided one-half interest in said real estate. The judgment being for the right party, the cause should be affirmed.

BROWN, C.—Suit begun in Pike County Circuit Court, August 26, 1909. The plaintiffs are Wertheimer-Swartz Shoe Company, and Landau Grocery Company, corporations, and Louis Landau their trustee. The defendants are Clevie H. Wyble, Bank of Eolia and William J. Buchanan. The object of the suit is to obtain a decree establishing the title to about one hundred acres of land in Pike county as against the defendants.

The petition states, in substance, that in October, 1906, D. Taylor Sanderson, and Robert B. Sanderson, as executors of the will of Thomas N. Sanderson, deceased, for the consideration of \$4000, conveyed the land in question to Tillie P. Rettke, wife of one Gustavus Charles Rettke, by deed duly recorded. That the purchase money was paid by Gustavus Charles Rettke by the transfer to the grantors of a stock of goods owned

by him in a store which he was running in the town of Cyrene in said county, for \$1500, and the execution of the joint note of himself and wife for \$2500 which he afterwards paid; and that the conveyance of the lands to said Tillie "was a mere subterfuge made, contrived and designed by her and her said husband to cover up the means of her said husband, and was so made with the intent to hinder, delay and defraud the creditors of the said Gustavus, and especially the plaintiffs." That during the months of June to September, inclusive, 1906, the said Gustavus, while running and operating his said store in Cyrene became indebted to the Wertheimer-Swartz Shoe Company in the amount of \$245, and to the Laudau Grocery Company in the amount of \$222.30; that each of said plaintiff corporations brought suit against him by attachment on November 9, 1906, alleging as grounds for such attachment that he had fraudulently conveyed and assigned his property and effects so as to hinder and delay his creditors, that he had concealed, removed and disposed of his property and effects so as to hinder and delay his creditors and that the debt sued for was fraudulently contracted. Writs of summons and attachment were sued out on the same date in each case. The summons in each was duly served, and on the 11th day of November the sheriff levied upon and seized the land in question under the writ in the case of the Laudau Grocery Company, and on the 12th day of November, 1906, levied upon and seized the same land in the Wertheimer-Swartz Shoe Company case; filing the abstracts of the attachment in both cases on the last named date. Both these abstracts recite the levy of the attachment upon the land to have been on the 12th day of November. The petition further recites, with sufficient detail, that the defendant in each of those cases made default and that judgment was taken against them respectively for the amount of their respective claims and interest. That an execution was

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issued on the Landau judgment April 2, 1907, under which the sheriff levied upon and seized all the right, title, interest and estate of the said Gustavus Charles Rettke in and to said real estate, and sold it at the June term, 1907, and that Louis Landau as trustee for the other plaintiffs herein became the purchaser for the price and sum of three dollars; and that thereupon the execution was returned by the sheriff unsatisfied, "and the said Louis Landau has ever since said sale and purchase by him held the title to said real estate in trust for the use, benefit and behoof of the other plaintiffs therein, to-wit: said Wertheimer-Swartz Shoe Company and Landau Grocery Company, and still holds the same." The petition proceeds as follows:

"That the said judgments were from and after said 12th day of November, 1906, and still are, liens upon said real estate; that on the 23d day of August, 1907, said Tillie P. Rettke and her said husband by deed of conveyance of that date purporting to convey said lands to said Clevie H. Wyble, which said deed was made without any consideration moving therefor, and was made with full notice to the parties thereto of the attachment of said lands, the lien thereon and the sale thereof as hereinbefore set forth; that such pretended sale was made and accepted in bad faith for the purpose of defrauding, hindering and delaying the creditors of said Gustavus Charles Rettke, and Clevie H. Wyble held said lands in trust for said creditors, and the said Clevie H. Wyble still so holds the same; that on the 30th day of August, 1907, said Clevie H. Wyble made a deed of conveyance of said lands purporting to be a deed of trust in the nature of a mortgage to said William J. Buchanan, as trustee for said Bank of Eolia, made for the pretended purpose of securing the payment of a promissory note for \$2000 made as alleged by said grantor to said bank; that said deeds of trust and promissory note were made without any

consideration therefor, and with the full knowledge by all of the parties thereto of said attachment liens on said lands, the said sale and the purchase thereof, and made for the purpose of aiding said Gustavus Charles Rettke, Tillie P. Rettke, and Clevie H. Wyble, in hindering, delaying and defrauding said creditors.

"Plaintiffs further state that said Gustavus Charles Rettke was rendered insolvent by said alleged sale of said lands to his wife, that he had no other property at any of the times herein mentioned nor has he any now and plaintiffs have no remedy at law and no means of collecting their said debts except by proceedings as herein set forth.

"Wherefore plaintiffs pray that said conveyances of said lands to said Tillie P. Rettke, to the said Clevie H. Wyble, and the deed of trust to said William J. Buchanan, trustee for said Bank of Eolia, and each of them, be held fraudulent and void as against the creditors of said Gustavus Charles Rettke, and especially the plaintiffs, and for all such further relief as may be deemed meet and just, and for costs."

Wyble answered admitting the execution of the deed from Tillie P. Rettke to himself and denying all other allegations of the petition. The bank and Buchanan filed a joint answer admitting the execution of the deed of trust and denied each of the other allegations of the petition. It will be observed that there is no allegation in the petition of the execution of a deed by the sheriff. The respondents made the following statement in their brief:

"This suit was brought under section 416, Revised Statutes 1899. Every allegation as required by said section is set out in the petition."

The court recites in its decree that the Sander-son conveyances "were fraudulent as to the plaintiffs and were a part of the plans and scheme and were procured by the said Tillie P. Rettke with the knowledge of the other defendants, for the purpose of de-

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frauding the plaintiffs herein; that the said conveyance of said lands to said Tillie P. Rettke was a mere subterfuge, made, contrived and designed by her and her husband, to cover up the means of her said husband and was so made with the intent to hinder and delay and defraud the creditors of the said Gustavus, and especially the plaintiffs herein." Also that "said plaintiff, Louis Landau, as trustee for the other plaintiffs herein, became the purchaser of said real estate for the price and sum of three dollars, and said execution was by said sheriff returned unsatisfied and the said Louis Landau has ever since said sale and purchase by him held the title to said real estate in trust for the use, benefit and behoof of the other plaintiffs herein, to-wit: Said Wertheimer-Swartz Shoe Company and Landau Grocery Company, and still so holds the same." Also that the deeds from the Sandersons to Mrs. Rettke "were fraudulent as to the plaintiffs and were a part of the plans and scheme and were procured by the said Tillie P. Rettke, with the knowledge of the other defendants for the purpose of defrauding the plaintiffs herein and were and are fraudulent and void as against the deed made and executed by W. F. Campbell as sheriff of Pike county, Missouri, dated the 11th day of June, 1907, and conveying to plaintiffs the right, title and interest of said Gustavus Charles Rettke in and to the lands above described and the plaintiffs have and recover of the defendants their costs in this behalf expended and that they have execution therefor."

The decree also mentions quitclaim deeds of twenty-three other persons, made and recorded before the beginning of this suit, and not mentioned in any pleading in the case, holding that they were made without consideration for the purpose of correcting supposed defects in the original executors' deed, and are fraudulent and void as to the plaintiffs.

Under the ruling of this court in *Craig v. Railroad*, 248 Mo. 270, approved in *Bridge Co. v. Corrigan*, 251 Mo. 683, the bill of exceptions was filed too late, and the case is before us on the record proper only. This imposes the duty to inquire whether the petition is sufficient to support the decree rendered.

The sufficiency of the petition as the statement of a cause of action is a proper subject of inquiry at every stage of the case. [R. S. 1909, sec. 180.]

From an examination of these pleadings it is not easy to obtain a clear idea of the nature and object of the suit. The controversy is about a tract of land alleged to have been sufficiently valuable to have been sold by its owners to one Rettke for \$4000. The payment of this amount stripped Rettke, who owed nearly \$500 to two of the plaintiffs, of everything he had, and he caused the land to be conveyed to his wife, so that to all appearances she became the capitalist and he the insolvent debtor. Each of the two creditors sued him by attachment, levied on the same land, obtained judgment, and one of them took out an execution under which he caused it to be sold by the sheriff. Instead of bidding independently, they jointly employed their co-plaintiff to bid for them both, and he became the purchaser for three dollars. The petition leaves them here. It does not disclose that a sheriff's deed was made.

Although it is evident that none of the plaintiffs have or can be entitled to any interest in the land otherwise than under the deed to Mrs. Rettke, the only prayer of the petition is that this deed be held fraudulent and void. It is true that there is, if we use a little construction to aid the language, a prayer

**Appeal:  
No Bill of  
Exceptions:  
Sufficiency  
of Petition.**

**Fraudulent  
Conveyance:  
Avoiding  
Deed:  
Petition.**

**Avoiding  
Deed from  
Third Person  
to Debtor's  
Wife.**

for general relief, under which the court might have held the deed to Mrs. Rettke valid, and as creating a valid trust in favor of such creditors of her husband as should, in equity, seek to enforce it. It created no trust in his own favor. Whenever one has come to this court to have such a trust declared he has met with discouragement; sometimes expressed in the most vigorous language consistent with judicial dignity and conservatism. We have told him that "he does not come into a court of equity with clean hands," that he has made his bed an unclean one—let him lie in it; that the maxim that he who comes into equity must come with clean hands "touches to the quick the dignity of a court of conscience itself;" that its application does not depend upon the averments of the pleadings, or the wish of counsel, but it may be invoked and applied *ex mero motu* by the court. [Creamer v. Bivert, 214 Mo. 473, and cases cited; Davidson v. Dockery, 179 Mo. 687.] All of which goes to show that when one attempts to hide the title to his property from his creditors under the mantle of another, equity will not, when the trick has served its purpose, search it out from its hiding place, and return it to him as on a silver platter, in the form of a judicial declaration of a trust in his favor. It will, rather, like a famous judge of old, take water and wash its hands in the presence of the multitude, in token of its innocence of the terrible thing about to happen.

The fact that in such a case as this, whatever may be the nature of the rights and remedies of creditors, and they are undoubtedly ample, the debtor has no title, either legal or equitable, of which the law can take notice, has induced some courts to doubt whether there is anything vendible on execution under statutes like ours, which only cover "real estate whereof the defendant or any person for his use, was seized, in law or equity, at the time of the issue and levy of the at-

Execution  
Sale.



tachment, or rendition of the judgment, order or decree whereon execution was issued, or at any time thereafter." Where the debtor, having the title, has made a fraudulent conveyance, the statute leaves no question of this kind, but pronounces his conveyance, so far as his creditors are concerned, "clearly and utterly void."

The Supreme Judicial Court of Maine, in distinguishing a case like the present, *Des Brisay v. Hogan*, 53 Me. 554, said: "It was decided in *Corey v. Greene*, 51 Me. 114, that where the debtor never had any title to the land, a levy is unnecessary. It is true that, in that case, the title was held by a stranger, while in this it is held by the debtor's wife. But this makes no difference. It is only when the debtor once had a title to the land and has conveyed it away fraudulently, that a levy can be of any use. In such case, the conveyance being fraudulent, it is as to the creditor no conveyance, and he may treat the title as still remaining in the debtor. But when, as in this case, the debtor never had any title, treating the conveyance to his wife as either valid or void will not give him a title—it will be either in the wife or her grantor—it will not be in the debtor—and a levy upon it as his property would be an idle and useless ceremony. No title could possibly be obtained by it."

In *Chicago & A. Bridge Company v. Packing Company*, 46 Fed. 584, 588, a similar case which arose under the Missouri statute, the court said that there is much practical sense in this distinction. Justice, however, does not require that we should follow it in this case. We can rather profit by the example Dickens has given us in *Mr. Jagers*. The scented soap with which he washed his hands of the sins of his clients left an odor more pungent, and characteristic, and tell-tale, than the sin itself. So when a court of equity has found that a litigant has, by an attempted fraud upon his creditors, either actual or constructive, placed him-

self outside the pale of its assistance, it should take care that the virtuous resentment in which it washes its hands of all participation in his fraud does not leave an odor in its nostrils so pungent and insidious that in its indignation it will offer its process to those who desire to pursue the culprit for purposes of plunder. We obtain an interesting view of this case from that standpoint.

The plaintiffs claim to have three dollars worth of equity in the four thousand dollars worth of land. It will not be claimed for a moment that the Rettkes, or any of the defendants, ever received any benefit whatever from this three dollars; in short, the court, in vindication of its own common sense and common knowledge, will presume that it was not sufficient to pay the cost of advertising and other costs incident to the sale. Instead of this sum having been applied to any extent toward the satisfaction of the judgments, it was used by the plaintiffs in payment of the cost of putting themselves in the commanding position from which they are carrying on this suit, leaving their judgment still intact for future use.

It was quite unnecessary that the plaintiffs should have expended these three dollars. The statute under which they attached the land gave them a remedy as broad and effective as that afforded by the statutory provisions relating to fraudulent conveyances and sales upon execution combined; and it certainly limited its remedy to a time preceding the execution and delivery of the sheriff's deed in which the attachment proceeding, if successful, must culminate; for it is given to the creditor and not to the execution purchaser. [R. S. 1909, sec. 2344.] The statement of plaintiffs in their brief that the case was brought upon the section just cited, together with the fact that the petition fails to allege the execution of a sheriff's deed, and does state that the defendant Wyble still holds the

land in trust for Rettke's creditors, might justify the disposition of this appeal upon that ground alone; but the attachment creditors have made the execution purchaser a party plaintiff; and the trial court in its decree having assumed the execution of a sheriff's deed to the plaintiff Landau notwithstanding the silence of the petition on that point, and having attempted with more or less clearness and success to grant relief upon that theory, we think it proper to briefly consider his rights from that standpoint.

There is no subject upon which the courts and textbooks have been more circumspect in the use of language than in treating of the effect of inadequacy of price upon execution and judicial sales. Mr. Rorer states the doctrine thus: "If there be no fact or circumstance relied on to set a sale aside but inadequacy of price, then the inadequacy must be such as in itself to raise the presumption of fraud, or else the sale will not be disturbed." [Rorer on Jud. Sales (2 Ed.), sec. 549.] In section 1095 of the same excellent work he repeats the idea as follows: "But although inadequacy of price will not alone be cause to set a sale aside, unless so gross as to raise a presumption of other cause, yet when inadequacy is combined with accident or appearance of fraud or unfairness, the sale will be set aside." In *Mangold v. Bacon*, 237 Mo. 496, 523, the court in correcting the language used by the majority in the same case upon a former appeal (229 Mo. 459), with a trifle more frankness said: "The majority opinion closed and locked a door heretofore open for use to reach relief in extreme and aggravated cases. That door should be left open—not only so, but *used* in this case on the facts here before us, even if no other ground of relief appears. In so far as the majority opinion is in conflict herewith, it should not be followed." We also said in *Guinan v. Donnell*, 201 Mo. 173, 202: "It has always been held by this court that

Inadequacy  
of Price.

inadequacy of price alone will not justify the setting aside of a sheriff's sale of real estate under execution, unless the price is so inadequate as to shock the moral sense and outrage the conscience. Then courts will interfere to promote the ends of justice. [Railroad v. Brown, 43 Mo. 294; Holden v. Vaughan, 64 Mo. 588; Knoop v. Kelsey, 121 Mo. 642; Davis v. McCann, 143 Mo. 172.]” These guarded expressions evidently mean that the courts do not desire to foreclose themselves from holding, if a proper case shall arise, that inadequacy of consideration alone may be such as to raise a presumption of fraud for which a sale will be set aside in equity, and that such inadequacy is always evidence to be considered in combination with other circumstances of fraud or unfairness in determining whether or not the sale should be set aside.

Applying these principles to the case stated in this petition we find no difficulty in dealing with the alleged equities of the plaintiffs. The inadequacy of price under the circumstances alleged is such as to render the sale a feigned and colorable one, a form through which whatever title or interest could be conveyed through the execution sale might be taken by these creditors without any rebate from their respective judgments or other consideration. This alone casts discredit upon the transaction, for the law contemplates that the single purpose for which land may be sold out at execution sales of this character is to raise money for application upon the judgment debt. The laws for this purpose are not open to the discreditable interpretation that they were devised to give creditors the opportunity to speculate upon either the misfortunes or sins of their debtors. Added to these

**Wrongful  
Combination  
at Sale.**

considerations is the fact that the petition shows upon its face that the inadequacy of price was produced by a wrongful combination between the attachment creditors which amounted to a fraud against the debtor.

The condition of the title practically placed the sale in the hands of two bidders, namely, the two judgment creditors. Each of these was able to bid the amount of his judgment and would probably do so; for they alleged that outside what was invested in this land the debtor was insolvent so that nothing more could be hoped for from his property, although the judgment could be held over him in the hope of realizing something from his future acquisitions. Had these men bid independently, as they were able to bid by reason of the means controlled by them for the payment of the price, it would have been highly improbable, in short we may reasonably say impossible, that the land would have been sold without some credit upon these judgments. It was the combination between them by the intervention of a trustee and that alone which enabled them to secure the land without any abatement of the debts.

We do not say that it is not competent for creditors under some circumstances to combine to bid upon the property of a debtor. We only say that any such combination is unlawful which leaves out of consideration the right of the debtor to a fair disposition of his property and substitutes its appropriation by the combination without any consideration whatever. In *Durfee v. Moran*, 57 Mo. 374, 379, in considering the same question we said: "That the price was grossly inadequate there can be no doubt, and although it is true that inadequacy of consideration is not of itself a distinct or independent principle of relief in equity, still, where the transaction discloses a state of affairs that shocks the moral sense or outrages the conscience, courts will interfere on slight circumstances to promote the ends of justice and defeat the schemes of fraud. [*Han. & St. Joe R. R. Co. v. Brown*, 43 Mo. 294.] Where property is palpably sacrificed, and a valuable estate is acquired for a mere pittance, all the attending circumstances will be closely scrutinized.

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Shoe Co. v. Wyble.

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[Parker v. Railroad, 44 Mo. 415.] It is now the uniform doctrine that any combination at public or private sale, having the effect of preventing competition in bidding, is against the policy of the law and void. In the case of Wooton v. Hinkle, 20 Mo. 290, a sale was set aside, because there was an agreement among several persons, that one of the number should bid off the land, and the others should refrain from bidding, and then it should be divided between them. [See also Hook v. Turner, 22 Mo. 333.]”

It does not help the plaintiffs to say that the transaction out of which they are trying to develop their remedy is a fraudulent one, and that therefore the defendants must be content to be meat for any beast of prey that chooses to make a meal off them. One cannot read the petition and decree without the impression that it was intended to be framed upon the theory of constructive notice of the attachments by the filing of the abstracts, and that these attachments of this land were notice of the claim that the title of Mrs. Rettke was affected by the fraud charged generally in the affidavit. The fact that the defendants overlooked or misapprehended these things would not outlaw them. In fact, were they in the penitentiary for crimes growing out of the same fraud, the circumstance would not justify this court in abating its watchfulness to make sure that any litigant seeking the aid of its equity powers to extinguish their interests came with clean hands and a worthy cause. We are of the opinion that could we consider this petition as a bill to remove the cloud of the Wyble claim from a title acquired by plaintiffs through the execution sale, it contains no equity, and the decree necessarily entered upon that theory is therefore erroneous. We do not think that, should it turn out that a deed was executed by the sheriff in pursuance of his sale to Landau, the circumstance, under the facts of this case, would stand

Unclean  
Hands in  
Equity.

in the way of a proceeding of the nature contemplated by section 2344, Revised Statutes 1909, to charge the judgment debts described in the petition against the land in question.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion, with leave to the parties to amend their respective pleadings in accordance with the rules of law applicable in such cases should they be so advised.

PER CURIAM.—This cause coming into Banc on a dissent is reheard there; with the result that *Woodson, Brown and Walker, JJ.*, concur in the divisional opinion of *Brown, C.*; *Faris, J.*, and *Lamm, C. J.*, concur in result only; *Graves and Bond, JJ.*, dissent.

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### THE STATE v. THOMAS GOULD, Appellant.

In Banc, November 17, 1914.

1. **INFORMATION: "With a Certain Deadly Weapon."** The use of the word "with" before the words "a certain deadly weapon," in an information charging assault with intent to kill, does not vitiate the information.
2. **ASSAULT WITH INTENT TO KILL: Self-Defense: Evidence.** After an altercation between defendant and W in a saloon W left and his hat was thrown after him into the street. When W returned with his brother to get his hat, as he says, defendant and his partner came out of the saloon with pistols, and defendant, after reviling the brothers, shot at W but missed him. W threw a rock that struck defendant, and then ran, whereupon defendant shot him twice in the hip. Defendant, however, testified that W struck him with the rock and shot at him before he fired. *Held*, that the question whether defendant acted in self-defense, or, with malice, assaulted W with intent to kill him, was for the jury.
3. **JEOPARDY: Jury Sworn Before Arraignment.** Defendant in a criminal case was not twice put in jeopardy where, after the

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jury had been sworn, it was discovered there had been no arraignment, and after he had then been arraigned and refused to plead the trial proceeded to his conviction.

4. **NONPREJUDICIAL ERROR: Refusal to Plead at Arraignment: No Entry of Plea: Appeal.** The failure to enter of record a plea of not guilty where, after the jury had been sworn, defendant was arraigned and refused to plead, stating that he stood on his "constitutional right to a discharge" as having been already placed in jeopardy on the same charge, was an error not prejudicial to the defendant on the merits and therefore (R. S. 1909, sec. 5115) not warranting reversal. [Concurring opinion by GRAVES, J., distinguishing *State v. O'Kelley*, 258 Mo. 345.]
5. **DATE OF CRIME: Instructions: Information and Proof.** Where the jury heard the information read, charging that the offense occurred December 19, 1912, and the evidence on both sides showed its occurrence on that date (a time within three years of the filing of the information), an instruction was not erroneous which laid the crime as within three years next before the filing of the information but gave no date.
6. **ASSAULT WITH INTENT TO KILL: Malice: Instructions: Verdict.** Where the information charged defendant with assault with intent to kill, with malice, and the jury found him guilty as charged, an instruction which told the jury that if they found the facts as stated therein they should find defendant guilty of assault with intent to kill, erred, if at all, in favor of defendant in not requiring the jury to specify in their verdict that the assault was made with malice.
7. **HOLIDAYS: Valid Sentence and Judgment.** Judgment and sentence entered on a legal holiday other than Sunday are valid.

Appeal from St. Francois Circuit Court.—*Hon. Peter H. Huck*, Judge.

**AFFIRMED.**

*B. H. Boyer* for appellant.

(1) The swearing of the jury the first time caused jeopardy to set in and hence defendant's motion for a directed verdict should have been sustained. *Ex parte Snyder*, 29 Mo. App. 260. (2) Instruction 1, given by the court was erroneous as not properly de-



claring the law of the case to the jury. It is in conflict with all the other instructions in the case and is misleading, confusing and resulted in the verdict rendered herein. Said instruction is at variance with the information and wholly improper, especially for the following reasons: Because said instruction directs the jury to find the defendant guilty if they find that "at any time within three years, next, before the filing of the information" he did certain things, and yet fails to inform the jury of the date laid in the information, or the date of the filing thereof. Because said instruction directs the jury to find defendant "guilty of assault with intent to kill" if certain facts were found and yet failed to tell the jury of what degree of said crime they should find him guilty. Because said instruction failed to tell the jury what it takes to constitute the crime of assault with intent to kill with malice aforethought, or that they found the necessary facts to find the defendant guilty of said crime as he stands charged in the information, as it should have done. Because said instruction and in fact all the instructions given in the case, submit the case to the jury upon the theory that there was a shooting at when the information charges a shooting. "The purpose of instructions is to inform the average layman of the jury of a clear and plain view of the legal principles applicable to the case, by which he may be guided to a just result." *Blanton v. Dold*, 109 Mo. 64; *State v. Turlington*, 102 Mo. 642; *State v. Lewis*, 118 Mo. 79; *State v. Bryant*, 55 Mo. 309. "Issues not pleaded should not be submitted by instruction." *Fairgrave v. Moberly*, 29 Mo. App. 141. "An instruction which is broader than the indictment should not be given." *State v. Smith*, 119 Mo. 439. "As to degree of crime there must be an instruction." *State v. Wyatt*, 50 Mo. 309. (3) The verdict is not in proper form and will not support a judgment. There is a great line of cases in this State holding that where

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there are two or more charges in the same count of the information, such as in burglary and larceny, that there must be a separate finding on each count or charge if a conviction on each or either and that a general finding will not suffice. *State v. McGee and McGraw*, 181 Mo. 315; *State v. Jones*, 168 Mo. 403; *State v. Rowe*, 142 Mo. 440; *State v. Logan*, 209 Mo. 402; *State v. McCune*, 209 Mo. 400; *State v. Kelley*, 206 Mo. 694; *State v. DeWitt*, 186 Mo. 67; and a great many other cases that might be cited. What would have been the result in this case if the jury should have returned the verdict they did but had assessed the punishment at imprisonment in the county jail for one year, or at a fine of one hundred dollars? (4) The motions for new trial and in arrest of judgment were overruled and, over the insistent protest of defendant, he was sentenced and judgment was passed and pronounced by the court on May 30, 1913. May 30th is, by virtue of Sec. 6701, R. S. 1909, a legal or public holiday. If civil judgments and executions thereon are prohibited on public holidays, and yet men may be deprived of their lives or liberty on such a day, then the constitutional inhibition against refusing to extend the equal protection of the law to all men is violated.

*John T. Barker*, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

(1) The cases of *State v. Wilson*, 172 Mo. 428, and *State v. Baker*, 216 Mo. 543, cited in appellant's brief, if anything, sustain the information in the case at bar. Notwithstanding the statement in the appellant's brief, the information in this case does charge that "the said Thomas Gould . . . did shoot off, at, against and upon the said Charles Whaley," and clearly alleges that the assault was committed by shooting. It is not necessary that the information should

allege that the weapon was "had or held in his hand or hands," as contended by the appellant. (2) The verdict finds "the defendant guilty as he stands charged in the information." This is a general verdict, and is proper in form and substance according to the decisions of this State. The information charged "assault with intent to kill with malice," and the words "with malice aforethought" in the verdict are unnecessary in order that the verdict be valid as to the charge alleged, the verdict being a general verdict and finding the defendant guilty as charged. *State v. Bishop*, 231 Mo. 411; *State v. Williams*, 191 Mo. 205. Where the information charges but one offense, a general verdict is sufficient in form. *State v. Gordon*, 196 Mo. 185; *State v. Stark*, 202 Mo. 210; *State v. Martin*, 230 Mo. 691; *State v. Richardson*, 248 Mo. 574. In the case at bar the court instructed the jury in instruction 1 as to assault with intent to kill with malice and in instruction 2 as to assault with intent to kill without malice. The information charged assault with intent to kill with malice and the jury returned a general verdict finding the appellant guilty under instruction 1. (3) It is contended that instruction 1 is faulty in that it instructs the jury on the question of the Statute of Limitations, using the words "at any time within three years next before the filing of the information," and does not set out the date on which the information is filed. There was no doubt in the evidence as to the exact date of the shooting and the assault, the evidence on this point not being in conflict. The information and the oath thereto were read to the jury, and the date of the oath must be assumed to have been on the same date as the filing of the information. Although it is customary in instructions to state the date upon which the information is filed, yet no decision can be found which holds that the omission of the date renders the instruction faulty. On the contrary, this court has held that the information is proper in

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form. Patterson's Instructions in Criminal Cases, sec. 85; State v. Washburn, 48 Mo. 240. It is contended that instruction 1 does not fully define "assault with intent to kill with malice." The contention of the appellant in this regard is unfounded. There are no degrees of "assault with intent to kill with malice," and the jury are fully directed in the second instruction as to "assault with intent to kill without malice" in the court's instruction 2. The court might have added "as charged" after the words "assault with intent to kill," but this was entirely unnecessary. State v. Tetrick, 199 Mo. 102; State v. Harris, 229 Mo. 423. (4) The record fails to show that a plea of "not guilty" was entered for the defendant by the court on defendant's refusal to plead. The facts as they appear from the record and the bill of exceptions are such as to apprise the appellant fully of the charge against him. The appellant heard the charge read to him. There was evidently an announcement of ready in the case when it was called and every opportunity was given him to enter his plea. After the formal arraignment the appellant did not object in any way to the failure of the court to enter the plea of record, and only did object at that time to proceeding with the trial for the reason there had been prior jeopardy. The case of State v. O'Kelley, 258 Mo. 345, squarely presents the necessity of a plea of guilty being entered of record. However, the facts above stated, we believe, present a stronger example of an instance of waiver of the plea on the part of the defendant. It cannot be said that there was any prejudice to the substantial rights of the defendant on the merits, and we believe the Statute of Jeofails, Sec. 5061, R. S. 1909, would clearly apply.

ROY, C.—Defendant was convicted of an assault with intent to kill with malice, and sentenced to three years in the penitentiary. The information so far

as it is necessary to set it out charges that defendant "on the nineteenth day of December, A. D. 1912, at and in the county of St. Francois and State of Missouri, in and upon one Charles Whaley, feloniously, wilfully, on purpose and of his malice aforethought did make an assault; and the said Thomas Gould with a certain deadly weapon, to-wit, a revolving pistol loaded with gunpowder and leaden balls, then and there feloniously, wilfully, on purpose and of his malice aforethought did shoot off, at, against and upon the said Charles Whaley then and there giving to the said Charles Whaley in and upon the body of him, the said Charles Whaley, with the pistol aforesaid, two wounds, with the felonious intent then and there him, the said Charles Whaley, feloniously, wilfully, on purpose and of his malice aforethought to kill and murder."

Defendant and Chris Iahn had been running a saloon at the town of Frankclay several years at the time of the alleged offense on December 19, 1912. Maston Whaley lived diagonally across the street from the saloon and conducted a "beer house" on the opposite side of the street almost opposite the saloon. Charles and Bert Whaley are his sons. On the night of the difficulty, Charles Whaley was in the saloon having a friendly time. The defendant spoke of a fight which had occurred between Luther Lawson and Bert Whaley, and said to Charles Whaley, "If I was as good a man as Lawson I wouldn't be afraid of all the Whaleys put together." Charles resented that statement and the defendant struck at him, knocking his hat off. Charles Whaley went out of the saloon and to his home, Iahn throwing his hat into the street after him. Charles Whaley told his brother Bert about what occurred, and they testified that Bert went for the hat, Charles following. The latter testified that the hat was six or seven feet from the saloon porch; that Iahn came out and said, "To hell with all of you. You all look alike to me, the whole Whaley family;" that Gould came

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out and said, "Get, you s— of b—, I'll kill you all," then stepped off the porch and fired a shot at witness and missed him; that witness then threw a rock at Gould and ran; that Gould shot him twice in the left hip. He testified that he did not have any pistol. Bert Whaley testified that defendant shot at Charles Whaley before the latter threw the rock, and that after defendant was hit by the rock he shot twice more at Charles.

Defendant and Iahn both testified that they had pistols when they went out of the saloon. Iahn did not know whether Charles Whaley shot at defendant. The latter testified that Charles Whaley struck him in the mouth with a rock and shot at him, grazing the side of his head, before he shot at Charles. The doctor testified that defendant had an injury to his mouth and a horizontal abrasion on the side of his head a half inch wide and an inch or an inch and a quarter long. Maston Whaley testified that defendant fired the first shot before he was struck by the rock.

Iahn, Tinker and defendant testified that the mother of Charles Whaley was standing in the street in front of the saloon with a shot gun in her hand.

After the jury was sworn to try the case, it was discovered that defendant had not been arraigned. The court proceeded to arraign him when the following occurred:

"Mr. Boyer: If the court please, I object to any arraignment of the defendant at this time by the reading of the information to him, or in any other manner, for the reason that the jury has been sworn to try this cause and the defendant has been placed in jeopardy, and the defendant should have his liberty by the court directing this jury to return a verdict of not guilty.

"The Court: Let the objection be overruled. Read the information to the defendant.

"Mr. Boyer: Note our exception to the ruling of the court."

Defendant was then arraigned and the following occurred:

"The Court (addressing defendant and defendant's counsel): Are you guilty or not guilty?"

"Mr. Boyer: Your Honor, we decline to plead. We are standing on our constitutional right, to a discharge on the ground of having already been placed in jeopardy on the same charge.

"The Court: The defendant will please stand up. Let the jury be resworn. (The defendant here rises.)

"Mr. Boyer: The court please, we desire to object to the swearing of this jury again, because the defendant has once been placed in jeopardy by the swearing of the jury to try this cause. It is a violation against the right of the defendant, that the defendant cannot be placed twice in jeopardy on the same charge.

"The Court: The court will have to overrule the objection. Swear the jury, Mr. Clerk."

The jury was then sworn the second time and the trial proceeded. At the close of the State's evidence and again at the close of all the evidence, defendant asked an instruction in the nature of a demurrer to the evidence. It was refused.

Instruction 1 given by the court was as follows:

"The court instructs the jury that if you believe and find from the evidence that defendant Thomas Gould, in the county of St. Francois and State of Missouri, at any time within three years next before the filing of the information, feloniously, wilfully and on purpose and of his malice aforethought, did shoot at Charles Whaley with intent to kill said Charles Whaley, the jury will find defendant guilty of assault with intent to kill and assess the punishment at imprison-

## State v. Gould.

ment in the penitentiary for not less than two years and not exceeding ten years."

The verdict was as follows: "We the jury find the defendant guilty as he stands charged in the information and assess his punishment at three years in the State penitentiary."

I. Appellant contends that the use of the word

"with" before the words "a certain

Information: deadly weapon" in the information viti-  
 "With" ates the indictment. That objection was  
 Certain made to the same use of the word *with*  
 Deadly in State v. Turlington, 102 Mo. l. c. 651.  
 Weapon.

It was held that the grammar and rhetoric were bad, but that the use of such word did not prejudice the substantial rights of the defendant.

II. It is contended that the evidence shows that defendant shot in self-defense; and that the demurrer to the evidence should have been given.

Evidence: We think not. It is conceded that both  
 Self-defense. Iahn and the defendant went out of the saloon with pistols. The defendant held his in his hand. The evidence for the State is that defendant shot at Charles Whaley before defendant was struck with the rock or shot at by any one.

III. Appellant contends that the jury having been sworn before the arraignment, his jeopardy had begun and that he was entitled to his discharge, and that the subsequent arraignment and swearing of the jury put the defendant a second time in jeopardy. The contrary was held in State v. Weber, 22 Mo. 321.

Former Jeopardy. discharge, and that the subsequent arraignment and swearing of the jury put the defendant a second time in jeopardy. The contrary was held in State v. Weber, 22 Mo. 321.

IV. When arraigned the defendant refused to plead but stated that he stood on "his constitutional right to a discharge on the ground of having already been placed in jeopardy on the same charge." No entry was made in the

Refusal to Plead.



record of a plea of not guilty. After what has been said in *State v. O'Kelley*, 258 Mo. 345, we hold that a failure to enter a plea of not guilty is not prejudicial error. The statute says that upon a refusal to plead, a plea of not guilty should be entered. In other words, the statute provides that the record shall show what is not true. Conceding that a failure to obey the statute in that respect is error it certainly is not one which prejudiced the substantial rights of the defendant on the merits.

V. Fault is found with instruction 1 because it tells the jury that if they find that the defendant did certain things within three years before the filing of the information, they should find him guilty, without telling them of the date laid in the information, or the date of the filing of the information. The jury heard the information read. It charged that the offense occurred on December 19, 1912. The evidence on both sides shows that the difficulty in controversy was on that date. It was within three years of the filing of the information. The failure of the instruction to state the dates as contended for, in no way affects defendant's rights and does not constitute error.

VI. It is said that instruction 1 tells the jury that if they found the facts as therein mentioned they should find defendant guilty of assault with intent to kill, without telling them to specify in the verdict that it was done with malice. If that omission was error, it was in favor of defendant, and he cannot complain. The jury did find him "guilty as he stands charged in the information" and that is sufficient. [*State v. Bishop*, 231 Mo. 411.]

Instructions:  
Exact Date  
of Crime  
Not Stated.

Malice:  
Instructions:  
Verdict.

VII. The fact that the judgment and sentence against defendant were entered on May 30, a legal holiday, does not invalidate the sentence and judgment. By section 1785, Revised Statutes 1909, Sundays and other holidays are put on a par so far as the service of writs, process, warrants, orders and judgments is concerned. Such service is void. Section 3880, which prohibits the holding of courts on Sunday, does not, by its terms, include other holidays. In *Bear v. Youngman*, 19 Mo. App. 41, it was held that a judgment rendered by a justice of the peace on Thanksgiving day is not void under a statute which provides that a justice of the peace may hold court on any day except Sunday. It may be said that that case is not authority here. In *Diesing v. Reilly*, 77 Mo. App. l. c. 455, it was said: "We are not, however, aware of any rule forbidding the performance of judicial duties on Christmas (twenty-fifth of December), or the other holidays mentioned in section 8952, Revised Statutes 1889. That section merely prohibits the service of civil process, except in certain attachment cases, but a judgment rendered on one of the days mentioned in the statute is not void. [*Bear v. Youngman*, 19 Mo. App. 41.]"

We agree with the latter case that there is no rule against the performance of judicial duties on legal holidays other than Sunday.

The judgment is affirmed. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., on a new hearing in Banc, is adopted as the opinion of the court; *Lamm, C. J.*, and *Woodson, Walker*, and *Brown, JJ.*, concur; *Graves, J.*, concurs in part and in result in a separate opinion in which *Bond, J.*, concurs; *Faris, J.*, dissents.

GRAVES, J.—I concur in the opinion of the learned Commissioner in this case. I place that concurrence on the ground that the omission to formally enter of record a plea of “not guilty” upon his refusal to plead, is a “defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits” (R. S. 1909, sec. 5115). This statute in my judgment covers this case. The Commissioner cites the recent case of *State v. O’Kelley*, 258 Mo. 345. As I gather it the decision in that case discussed two views as tending to uphold the doctrine that the absence of a plea of “not guilty” would not vitiate the proceeding. First, that the failure to enter such plea of record was a defect of record covered by section 5115, *supra*, and secondly, that the conduct of the defendant amounted to a waiver of the formal plea, and the entry thereof. We note this, because in the case at bar, it cannot be said that the defendant by his conduct waived anything. It will not do in this case to bottom the decision upon the doctrine of waiver, which was a potential feature in the *O’Kelley* case. I therefore concur for the reason stated at the outset. *Bond, J.*, concurs in these views.

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JACOB SCHIEBERL et al. v. HENRY J.  
SCHIEBERL, Appellant.

In Banc, November 17, 1914.

1. **WILL CONTEST: Aged Testator: Unequal Distribution: Undue Influence: Testamentary Capacity: Evidence.** Testator when about 81 years old journeyed from his home at Cole Camp to Marshall, Missouri, where he spent several months with his son Henry. While there, having gone with Henry to a lawyer’s office, he made a will by which he devised his real estate, worth about \$15,000, to that son, and gave to his six

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other children respectively \$100, \$500, \$100, \$200, \$15, and \$1000. He then returned to live until his death with his daughter at Cole Camp. In a contest of the will there was evidence, though it was by no means uncontradicted, that for two years before the will was written the testator had, on account of mental incapacity, ceased to attend to his business; and while the attesting witnesses testified that they considered him of sound mind, neither of them had had any acquaintance with him prior to the making of the will. *Held*, that the questions of testamentary capacity and undue influence were for the jury.

2. ———: ———: ———: **Erroneous Instruction.** An instruction in a will contest which told the jury that if they found the provisions of the will to be grossly unequal and discriminatory, then such inequality and discrimination, if not explained or accounted for, might be considered as tending to show want of capacity to make a valid will, but for that purpose only, was reversible error in that it failed to include other circumstances tending to show mental incapacity. Gross inequality in the distribution of an estate is a circumstance which, when coupled with other circumstances, may tend to show mental incapacity, but standing alone it has no such tendency. [WOODSON and GRAVES, JJ., dissent on the ground that the evidence so conclusively showed mental incapacity that the proponent was not harmed by the instruction.]
3. ———: ———: **Old Age and Infirmary as Evidence of Mental Incapacity: Instruction.** In a will contest an instruction which told the jury that old age, sickness, bodily disease, and infirmities alone furnished no evidence of mental incapacity, and that unless they found testator's mind to have been so unsound that he could not understand the act he was performing, the property he possessed, the disposition he was making of it, and the objects of his bounty, they could not find against the will on the ground of mental incapacity, was rightly refused. Evidence of old age, sickness, bodily disease, and infirmities are all matters to be considered by the jury in determining mental capacity.
4. ———: **Subscribing Witness: Evidence of Facts Upon Which He Bases Opinion of Testator's Capacity.** *Semble* that in a will contest a subscribing witness should be permitted to state on what facts his opinion as to the testator's mental capacity is based.

Appeal from Benton Circuit Court.—*Hon. C. A. Denton*, Judge.

REVERSED AND REMANDED.

*Alf F. Rector and Henry P. Lay* for appellant.

(1) There being no substantial evidence of lack of testamentary capacity, it was the duty of the trial court to direct a verdict for the defendant, and having failed to do so, this court will review all the testimony, and finding no such evidence will reverse the case and remand with directions to enter a judgment sustaining the will. It appearing that the testator had mind enough to understand that he was making his will and knew the natural objects of his bounty, the extent of his property, and the disposition he was making of it, his will must be upheld. Neither evidence of old age, feebleness and eccentricities, nor the opinions of nonexpert witnesses not based on facts which show mental incapacity, will justify the submission of the case to the jury. *Winn v. Grier*, 217 Mo. 420; *Hamon v. Hamon*, 180 Mo. 685; *Cash v. Lust*, 142 Mo. 630; *Sayre v. Princeton*, 192 Mo. 95; *Gibony v. Foster*, 230 Mo. 106; *Weston v. Hanson*, 212 Mo. 248; *Southworth v. Southworth*, 173 Mo. 59. (2) Instruction 4, given on the part of plaintiff over the objection of the defendants, is erroneous and improper and highly prejudicial to the defendant. In 1 *Underhill on Wills*, p. 147, it is said: "It is therefore reversible error for the court to single out an unequal distribution from all facts in evidence and give a special instruction as to the effect that would have in determining that the testator was insane." *Bledsoe v. Bledsoe*, 1 S. W. 10; *Zemlech v. Zemlech*, 90 Ky. 655; *Mattox v. Mattox*, 114 Mo. 49. There is no evidence whatever of any confidential or fiduciary relations between testator and defendant Henry J. Schieberl so as to cast upon him the burden of explaining why his father had given him a larger part of his property than that given the other members of the family. *McFadin v.*

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Catron, 120 Mo. 274; Hughes v. Rader, 183 Mo. 712-13. This instruction is particularly vicious by reason of the fact that the court by instruction 5 given for the plaintiff includes the reasonableness or unreasonableness of the will as a fact for the consideration of the jury. It will be readily seen that the undue prominence given by the trial court to the unequal distribution among the testator's children must have been highly prejudicial to the defendant, it being well known that juries are too prone to attempt to correct real or fancied inequalities in wills, thus substituting their necessarily limited knowledge of the relationship and condition of the parties for the full knowledge of and the wishes of the testator. (3) It was error to refuse to permit attesting witness Hiram Ferril to give his opinion as to whether testator at the time of the execution of the will knew what property he had and how he was disposing of it in his will. This was denied because the witness had not given the facts on which he based the opinion, which is not necessary or required in the case of attesting witnesses. While it is true this witness was at first permitted to state that he considered testator of sound mind, afterwards the action of the court in the presence of the jury, practically destroyed the value of the testimony of this subscribing witness, which was reversible error. 1 Underhill on Wills, p. 107, and sec. 102. In 40 Cyc. 1035, it is stated: "It is a well-settled rule that a subscribing witness to a will may testify as to his opinion formed at the time of the execution of the will, of the mental capacity of the testator without stating the facts or grounds upon which the opinion is based, and the testimony of such a witness is entitled to considerable weight." Citing Southworth v. Southworth, 173 Mo. 59. The trial court proceeded on the theory that an attesting witness was only competent to give his opinion of the capacity of testator after he had given the facts upon which the opinion was based. This is not

the rule. (4) Instruction 1-1/2-D, asked by the defendant and refused by the court, should have been given. *McFadin v. Catron*, 138 Mo. 217; *Crouch v. Gentry*, 113 Mo. 248.

*George F. Longan, T. C. Owen and W. S. Jackson*  
for respondents.

Witnesses who bear close family, social or business relations with testator possess the most favorable opportunities for knowing his mental conditions, and usually their testimony as to his mental capacity is entitled to great weight. *Holton v. Cochran*, 208 Mo. 314; *Knapp v. Trust Co.*, 199 Mo. 640. Gross inequality in the dispositions of the instrument when no reason for it is suggested, either in the will or otherwise, may change the burden, and require explanation on the part of those who support the will, to induce the belief that it was a free and deliberate off-spring of a rational, self poised and clearly disposed mind. *Gay v. Gilliam*, 92 Mo. 150; *Harvey v. Sullen*, 46 Mo. 147; *Mowry v. Norman*, 204 Mo. 173. The provisions of the will itself are competent evidence as to the testamentary capacity, and if there is unjust discrimination against those entitled to be provided for, it is a circumstance tending to show want of capacity. *Gay v. Gilliam*, 92 Mo. 250; *Roberts v. Bartlett*, 190 Mo. 699; *Young v. Ridenbaugh*, 67 Mo. 586. A will contest is an action at law, and this court will not pass upon the credibility of the witnesses and the weight of the evidence, if the evidence be substantial; these considerations are relegated to the triers of the facts. *Naylor v. McRuer*, 248 Mo. 458. Where there is substantial evidence of testator's incapacity to make a will, the issue becomes one for the determination of the jury and not to be determined by a peremptory instruction. *Mowry v. Kettering*, 204 Mo. 173; *Naylor v. McRuer*, 248 Mo. 458. Instruction 4 given for plain-

tiffs and complained of at point 2 of appellant's brief, was proper. The provisions of the will itself are competent evidence, when grossly unequal and discriminatory, as tending to show want of mental capacity, and the burden being on the proponents all the way through the case to show mental capacity, there could have been no error in giving the instruction as framed, for it was limited and circumscribed in its terms so that in effect it did no more than tell the jury that they might consider the terms of the will as tending to show mental incapacity if its provisions were unexplained. *Meier v. Butcher*, 197 Mo. 89. The rulings in the *Mattox* case and other cases cited by appellant are not in point in connection with this proposition. (a) Because the instructions referred to therein, are not identical in language, nor substantially so with the one at issue. (b) Because upon the issue of undue influence (unless a confidential relation is shown to exist) the burden is always on the contestants and in the cases cited under this head by appellant the court was dealing with the question of undue influence and not with mental capacity. With regard to mental capacity the burden continues upon the proponents of the will throughout the case and in the present case the issue of undue influence had been eliminated and taken from the jury by instruction 7. *Mowry v. Norman*, 204 Mo 189. There was no error in refusing defendant's instruction 1½D because the law of the case from defendant's point of view had been fully and correctly declared in the other instructions given at plaintiff's request, and the same proposition of law fully submitted in such instructions.

ROY, C.—This is a proceeding by Jacob Schieberl, Mary Esser, Martin Schieberl, Joseph Schieberl and Elizabeth Stohr, contesting the will of Johan Schieberl on the ground of unsoundness of mind of the testator and of undue

Will  
Contest.



influence. Henry J. Schieberl, John Schieberl, Wenzel Schieberl, John Schieberl, Jr., and the trustees of St. Peter's Roman Catholic Church of Cole Camp were made defendants. There was a verdict against the will. Henry J. Schieberl alone has appealed.

The will is as follows:

"The last will and testament of Johan Schieberl. Know all men by these presents that I, Johan Schieberl, of Benton county, in the State of Missouri, do make and publish this my last will and testament now revoking all former wills by me made.

"First, I will all my just debts be paid.

"Second, I will, give and devise to my son, Henry J. Schieberl of Saline county, Mo., the following described lands situated in the county of Benton in the State of Missouri to have and to hold in fee simple to him and his heirs and assigns forever, to-wit:

"The northwest quarter of section twenty-three (23) township forty-three (43) range twenty-two (22).

"The southeast quarter of the southwest quarter of section twenty-one (21), township forty-two (42), range twenty-one (21). The west half of the northwest quarter of section thirty-two (32), township forty-three (43), range twenty-one (21). The west half of the northeast quarter of section twenty-eight (28) township forty-three (43), range twenty-two (22), and the ten acre tract owned by me in the southwest quarter of the northwest quarter of section thirteen (13) township forty-two (42), range twenty-one (21); containing in the aggregate four hundred and ten acres.

"Third, I will and bequeath to my son, Jacob Schieberl, two hundred dollars.

"Fourth, I will and bequeath to my daughter Mary Esser, five hundred dollars.

"Fifth, I will and bequeath to my son John Schieberl, one hundred dollars.

"Sixth, I will and bequeath to my son Martin Schieberl two hundred dollars.

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"Seventh, I will and bequeath to my son Joseph Schieberl the sum of fifteen (\$15) dollars.

"Eighth, I will and bequeath to my daughter Elizabeth Stohr the sum of one thousand dollars.

"Ninth, I will, give and bequeath to St. Peter Roman Catholic Church at Cole Camp, Benton county, Missouri, the sum of one hundred dollars, to be paid to the treasurer of said church, said sum to be kept at interest, and the annual interest thereon to be used in keeping the property of said church in repair, and the principal to be used for the same purpose, or in rebuilding the church, when absolutely necessary. The rest and residue of my property, real and personal or mixed, I give and bequeath to my seven children heretofore named in this will share and share alike.

"Tenth, having heard nothing of my son John Scheiberl for about five years, if he has departed this life, it is my will that the sum of one hundred dollars given to my said son John, by the fifth item of this will to be paid to the two sons of John Schieberl, namely John and Wenzel, share and share alike, it is my will that the other children of said son John shall have no interest in my estate.

"I appoint my son Henry J. Schieberl, executor of this my last will and testament and request that no bond as such be required of him. Witness my hand this 13th day of August, 1908.

"JOHAN SCHIEBERL,"

The proponents offered formal proof of the will as follows:

Alf F. Rector, one of the attorneys for the defendants, testified: "I have practiced law since 1885. I wrote the will of Johan Schieberl; I had seen him before, but had no acquaintance with him. Mr. Ferrell and I witnessed it at his request. We saw him sign it, and he declared it to be his will. He had a deed and a tax receipt from which I got the description of the land. He gave me the names of all his children and

stated what he wanted to give to each one. Henry had no part in writing the will except to answer one or two questions that I asked him as to the spelling of some of the names. The old gentleman told me generally what he had. I saw no indication of any weakness in him. I considered him of sound mind. He said he wanted to give Henry his land, and said that his personal property would amount to two thousand or twenty-five hundred dollars, in notes and deposits. He said that John and Martin each owed him a note. He seemed to understand me perfectly well. Sometimes I would have to make him repeat. I read the will to him. Mr. Ferrell did not know the testator. They were there in the office some time together. Henry Schieberl had spoken to me that morning or the day before and made an appointment to write the will."

Hiram Ferrell: "I am seventy-three years old and live at Marshall. Have been county clerk and deputy and justice of the peace. I witnessed the will. It was read and explained to him by Mr. Rector who also witnessed it. I considered the testator of sound mind. I heard conversation between him and Rector." During his examination the following occurred:

"Q. State whether, from what was said by Schieberl, and his manner, conduct and appearance, you are of the opinion that his mental condition was such that he knew what property he had, and how he was disposing of it in said will?"

"By Judge Longan: Mr. Rector stated here that he wasn't there at the time the will was drawn; so he didn't hear anything.

"By the Court: I am inclined to think the objection is good.

"To which ruling the defendant then and there excepted and now excepts."

"I don't think I had any acquaintance with John Schieberl before that day. The will had been prepared

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when I got into Mr. Rector's office. I don't know Henry Schieberl."

The will and its attestation were then read in evidence. The contestants offered the following evidence:

J. F. Howe, cashier of the bank of Ionia, testified: "I knew Schieberl for twenty-five years; I wrote rental contracts for Schieberl for ten years, did not make the contracts, but wrote them at Schieberl's request. He made time deposits and wanted interest on them, that was when he began to deposit in 1905; he was a pensioner and would deposit his pension and want interest on it. He talked very fast and sometimes I would ask him to go slower. For three years he was failing fast both in body and mind. In the last three or four years, Mr. Stohr frequently came with him to the bank; in the last three years he had done but little business, if any, unassisted. Mr. Stohr usually accompanied him to the bank when there was business to be done. In May, 1908, when I last saw him, he did not have the intelligence necessary to transact his business alone. One cold stormy day, when other people wore overcoats, he came in wearing slippers without socks and with just a little cape about his shoulders; when busy talking would not notice other people standing by. He kept money in the bank on open account and on time deposit. He or some one else would make the contracts for rent and I would put them in writing; would sometimes send the renter with Stohr and would sometimes come himself. I never knew of him being beaten out of any money; he or somebody else preserved it."

During cross-examination the following occurred:

"Q. I am trying to find—I believe you stated a while ago, that your judgment was that he wasn't completely competent to attend to all his business transactions, without assistance, is that right? A. That's right.

"Q. Now isn't it a fact almost every man needs some assistance in attending to all his business transactions; and needs somebody that understands drawing up contracts? A. A good many of us do, yes, sir.

"Q. Well; that is what you meant by that; wasn't it? A. Not exactly, Mr. Lay.

"Q. Well, what did you mean by it, Squire? A. Well, I meant that his understanding of business—that the education that he had—he had no education; that his understanding of business wasn't what it ought to be.

"Q. And that he needed someone to explain these matters to him? A. Yes, sir.

"Q. And draw his interest contracts? A. That is just what I meant to answer.

"Q. I thought that is what you meant; now you haven't any doubt but that at that time the old gentleman knew what property he had, had you—what land the note was on? A. That he owned a farm here and a farm there?

"Q. Yes. A. Oh, yes; he knew that.

"Q. He knew that? A. Knew he had a farm here and a farm there; and a piece of land there.

"Q. And also knew that he had money in your bank? A. Certainly; I don't know whether he knew how much or not; he knew he had money there.

"Q. He knew his children, didn't he; knew who they were? A. I think so, yes, sir.

"Q. And if he would give anything to anybody, he had mind enough to understand that he was giving them something—wouldn't he? A. Well, yes, he would understand that; he understood it, but—well, you haven't asked me."

On redirect examination the following:

"Q. What do you mean by business capacity, with reference to his mental condition? I am getting at—Squire Howe, do you mean to tell this jury, that this man was absolutely sound, and that you don't mean

to say anything else but that he had business capacity, but didn't have business qualifications? That is what Mr. Lay said you meant; I want to see whether you meant that or not."

"By Mr. Rector: I object to that; he's cross-examining his own witness.

"By the Court: It looks a little that way; I believe I will let the answer go.

"A. I said I regarded—I answered that question, I am sure, further along—that I didn't regard his judgment—that he was enfeebled both in body and mind; I would not regard his judgment as sound upon business transactions; now, if they want it that plain, I will state it that way; that is getting around to just what I think I said in other words."

On re-cross-examination the following:

"Q. You didn't mean, by that, however, to say, Squire, that you think that he didn't know, didn't realize what property he owned, did you? A. I told you that he knew that he had a farm over there, and he had a farm where he lived, and that he had a pasture down here, and had a piece of timber land over there.

"Q. He knew he had money in the bank? A. Yes, sir.

"Q. Well; that was about all the property he had, wasn't it? A. That's all I know of.

"Q. And he knew of all that property, didn't he? A. I told you I think he did. Yes, sir.

"Q. And also knew his children, who they were; you have no doubt of that, have you; I believe you answered that question before? A. I think so too; I think I answered it.

"Q. Well, Judge Longan has gone after it all again; I want to make this proposition clear; you do think that he realized what children he had; what heirs? A. That he knew all his children?

"Q. Yes. A. Why, certainly, I do.

"Q. And that if he was drawing a will, leaving his property to those children; you believe that he had sufficient mind to understand that he was making such a will? A. Yes, sir.

"Q. And he did transact various business matters, and, so far as you know, never lost any money by so doing? A. No, not as far as I know.

"By Judge Longan: Do you mean to have the witness say he transacted various business matters in the last year or two?

"By Mr. Lay: Yes, sir.

"By Judge Longan: Better let the witness understand it that way.

"Q. He did transact various business matters with you in the last years of his life? A. I repeatedly said, Mr. Lay, in the last three or four years of his life—three years—Mr. Stohr came with him, when there was any important business to be done.

"Q. Do you mean to say that Mr. Stohr always came with him? A. Unless he came to make a pension voucher, he usually brought him; I say sometimes the old gentleman came—one time I related to you when he came improperly clad; he came alone that day.

"Q. And another time he walked, when you thought he ought not to? A. Yes, I say; but usually, in the last years of his life, Mr. Stohr came with him; and at times when someone was to settle with him, or their paper was to be renewed, or something, Mr. Stohr would then bring that, and say grandpa wants so and so done.

"Q. Now when he came up there to make a deposit with you, he wouldn't ask Stohr's advice about making it, would he? A. Do you want me to tell the whole thing, the whole of it?

"Q. I am asking you that question? A. Mr. Stohr and Schieberl would come in together; Schieberl would walk up to the window, and Stohr would come in at his side.

“Q. Walk up to your window? A. Yes, sir.

“Q. And Schieberl would tell you what he wanted done? A. Well, I don't know whether he told me, or whether anything was said; he would take out his paper, and I knew he wanted cash for it.

“Q. Well, you didn't hear him, under those circumstances, asking Stohr what he ought to do with it? A. No. Stohr would sometimes say what the old gentleman wanted.”

On redirect examination the following:

“Q. I will ask you this question, Mr. Howe: Based upon all the facts that you have testified to, with reference to Mr. Johan Schieberl, and his condition in May, 1908, and for a year preceding that month, and up until the last time you saw him, I will ask you if, in your opinion, he was, without the aid of any other person, strong enough in mind to comprehend all of his property, and all the persons who naturally came within the range of his bounty; or if he had sufficient intelligence to understand his ordinary business, or to know what disposition he would be making of his property, without the assistance of some one else, if he was making a will at that time?

“A. I have answered the question to my understanding.

“By the Court: Mr. Howe, just please answer the questions as they propound them, and they will take care of it.

“A. Well, I do, Judge; I have answered the question; I have to understand the question; I understood it to be the same that I answered no.

“Q. And you answer this no? A. I do, yes, sir.”

Re-cross-examination as follows:

“Q. Now, by answering that no; you don't intend to tell the jury that he didn't have any of those faculties, do you? A. I meant he didn't have all of them; that is the way the question is.



"Q. By that you simply mean, as you explained to the jury before, that you think, by reason of his lack of business capacity, and lack of education, that he wasn't fully qualified to transact his business, without assistance? A. Business capacity, and education, and judgment.

"Q. By reason of the lack of that? A. I mean just what the English language expresses in that question.

"Q. That he wasn't fully capable of transacting his business, without assistance? A. Yes, sir.

"Q. But as to the rest of the question you don't answer no? A. I have to answer that question, the question was entire; I can't answer part of it, because Judge said I had to say yes or no."

Louis Schnabel, a merchant of Ionia, testified: "I knew Schieberl twenty or thirty years. Ten years before his death he was strong in mind and body; last two or three years he declined mentally and physically. He didn't do much business with me while he stopped with Mr. Stohr; of course they frequently bought his clothes, something to eat. He didn't seem to be at himself at times and would say things in presence of ladies which were not fit to be spoken in their presence. That was in the last two or three years. He didn't seem to lack intelligence at all; did not make such breaks until the last two or three years. His mental condition was weakened so that he didn't comprehend what he was saying."

Jerry Gallivan testified:

"I live at Martin Stohr's, have been there about four years; knew Johan Schieberl about twenty years. He was in the shop at Cole Camp when I first knew him and was a pretty stout, robust man, weighing about 185 or 190 pounds; the last two years he became very weak, weighing about 115 or 116 pounds. I was a farm hand. He would cut off limbs of trees and hedges and put in the creek; that wasn't benefiting the

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place any that I could see, but was tormenting other people. The first flood that came would wash it down against the other man. He did that pretty much all the summer time, kept it up from the time I first went there until after he came back from Marshall. I once saw him running around there on the creek without breeches or drawers on and with no shoes. He would gather up nails and strings and rocks and have them in his pocket. Mrs. Stohr would wash his clothes and throw those things away and he would put more stuff back in his pocket. When he was about the kitchen he was right in the way all the time, wouldn't move for anybody; would look in every vessel on the stove, staid in the kitchen pretty near all the time. I would go through the motions, go lifting off lids, and would say: 'Lizzie, what have you got in here?' and she would say: 'Go away from here; keep your nose out of my pots;' do that for his benefit; go to scolding me; I would go over the same performance.

"Q. Why did you go over the same performance? A. To get him to quit it. Q. So that she could reprimand him? A. Yes, sir. Q. What would he say about it? A. Never opened his mouth about it. Q. Would he quit? A. He would quit for that time; be the same thing over again in the next day or two. Mrs. Stohr would say nothing to him about it. He would clean his pipe and put it on the back part of the stove to dry. He would get a fruit can with red pepper in it; had quite a nice perfume there all the time. He put nicotine on the stove, tried to make snuff of it, drank red pepper tea, piping hot. The lady would never say anything to him about it. He would lie on the bed with his shoes on, with mud and manure on them. When Mrs. Stohr would gargle her throat with hot salt water, he would fix some the same way and drink it. When I first went there he would wake up during the night and pray so loud that he would wake

everybody up. About two years before he died he quit praying and quit reading his Gospel, as he called it. He was nervous when a storm came up and kept the little child with him until the storm was over. He treated the child well and she followed him around, and many times buttoned his breeches for him. She was eight years old. He exposed his person in the presence of the child and of anybody who would happen to be around. His mind was not extra good, he would forget where he would leave things and accuse the children of misplacing them; raised Cain there one day because he could not find his drawing knife. He depended on others, was not able to take care of himself; said he did not have any blood in his heart. He was very childish towards the last; I could not say that he was insane, but he was forgetful about things. He had only one eye. I never saw him under the influence of liquor over three times, then he was pretty noisy. I don't think he was competent to attend to his ordinary business affairs; he would have Mr. Stohr attend to his business for him. Nobody ever went there to rent a farm but Mr. Stohr had his say about it. He would call him in, didn't make any difference what he was doing. When he got to Ionia, coming from Marshall, Mr. Stohr quit his work and brought him home and the old gentleman went to bed and staid there until about five o'clock in the evening. He was getting worse all the time; towards the last it got so he didn't do anything but sit in a stupor. Three or four years ago they performed an operation on him, on his back, or tail bone, you might call it. The doctor put his finger up there and could not touch bottom, corruption run out of it. Mr. Stohr had to attend to him. He went down hill after that, never was the same man, mentally or physically. We treated him just like we would a child. He would never get out of the way; it didn't make any difference what you were carrying, he wouldn't move. He would go to the

creek bank with his pockets full of dust, chaff, and feed, and scatter it on the creek bank. I never heard any trouble between him and Mrs. Stohr. He seemed to be fonder of her than any of the other children and was very fond of the youngest child."

Wm. D. Brunjes testified: "I am a lawyer and interested in farming. I knew Schieberl ever since I was a small boy. He was at first a strong man. Saw him about two years before his death. He didn't look to be anything like the height he had been when he was in his prime; he was decrepit in every sense of the term; fallen face, fallen cheeks, practically didn't seem any mind there at all; practically no life, decrepit as one could almost picture any old man. His mind went down with his body, in about the same comparison. He had no mind, wholly incompetent; he dissipated a great deal. It was very hard to grasp what he would say; his language was a conglomeration, just a wave and roll of words; he could not understand English as well as German."

C. O. Howe, assistant cashier of the bank of Ionia, testified: "Knew Schieberl since 1905. He became weaker mentally and physically ever since I knew him. When he came to the bank ordinarily he would know me, but on the street he didn't recognize me from any of the other boys; that was the last two years. At first I could not understand him and would have to talk to him as much by gesture as by speech. He would repeat things in the same conversation. I have known him to just stand and keep looking at me and I would get tired of explaining it over and over and he would finally go on and not give me any sign of recognition at all. The past year he wouldn't attempt to talk to any one, hardly my father. He never went through his accounts to see how we stood. After that operation he laid very low and never did recover. He had just recovered from a hard spell of sickness when he went to Marshall. At that time he was going down

very fast. I hardly ever saw him in conversation with others, as the bank is not the place for loafers. He came to the bank very often with his clothes unbuttoned and lightly clad. He came once in cold weather with house shoes and no socks. He was not capable mentally to comprehend the value or extent of his property, the names and number of his children and the objects of his bounty. He was not capable of transacting business at all, because we did all of his business for him. There were times when I didn't think he would know who his children were; there were times probably when he did. He would forget business that we transacted and went over for him time and again, he would forget entirely about that, sometimes before he would leave the bank."

Everett Golden testified: "Jacob Schmelier, Sam Golden, and I were the nearest neighbors to Mr. Schieberl; have known him thirty-five years. I never could understand him very well. Four or five years ago I spoke to him about renting some land. He said I would have to see Martin Stohr about it. In June, 1908, he was getting older and weaker and feebler and declined more rapidly after the operation."

Sam Golden testified: "I have lived near Schieberl twenty-five years. He lived with Martin Stohr, who attended to the business all the time, as far as I know. In June, 1908, Schieberl was going down all the time in both body and mind. He was not mentally competent to transact ordinary business by himself. He didn't act like a man, seemed like a child, like he didn't know anything. He always had somebody with him when he went past my place."

Martin Schieberl, son of testator, testified: "When father was forty years old he weighed 190 pounds and was the strongest man in Cole Camp. He was going on eighty-two years old when he died. He got drunk a good deal and was very quarrelsome when he was drunk; he raised a great deal of disturbance among his

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family and caused hard feelings. He had a good family of children and he had a good woman also. Father and Henry had a falling out. Father wanted to hire him, offered him \$18 a month. He told my father he would not work on the farm for any s—of-a-b— for any \$18 a month. He went to Sedalia; he didn't get to see father very often, about once in three or four years. Father went to see him twice in the last ten years. The last three years father was weak in mind and body. About six years ago he owed brother Jacob about \$600 and paid it. He quarreled with everybody when he was drunk. I am worth about \$1500. Martin Stohr has 15 or 16 cattle and 7 or 8 horses. I paid father a note of \$530 just a few days before his death; I paid it in currency at his home."

Jake Schieberl, son of the testator, testified: "I live in Sedalia; I saw father the last time he went to Marshall. When I went to supper he was at my house in bed. I said, 'Howdy, father.' He said something; I could not understand what he said; I asked him what was the matter with him; he never answered me; never said he was sick, and he laid down at the depot. That was when he went to Marshall; he didn't stop as he came back. He said he was going to Henry's, down at Marshall. I took him to the Katy depot and got a ticket for him to Boonville. He was weak minded, too weak to go any place. I work for the Babcock Lumber Company. My sister, Mrs. Esser, lives in Sedalia; she is a widow and has eight or nine children, she has no property. I was not at father's house after he died nor at that time. I went to see father when he had that operation. In 1908 I had \$2000 worth of property I think."

Mrs. Esser testified: "I am fifty years old. My husband died a year ago last January. I have ten children living and no property. I saw father at my brother's in 1908 when he went to Marshall. I put my hand over his shoulder and he looked around and

didn't know me and asked my sister-in-law who that was; he wasn't able to talk. Brother Henry told me how the will was, and said, 'Don't cause any trouble. If you need any help, I will help you;' and as he left he gave me two dollars."

Mrs. Martin Stohr, daughter of the testator, testified: "The first six months I was married we lived with brother Jacob; then father got me a house and made his home with me until his death, the last three years. He had an operation performed and he kept going down gradually, was feeble in body and mind and very childish, put the dirt and grit out of his pipe on the stove and burned that and put it in a box; and he would make red pepper tea and drink that; would pick up old rags and shoe strings and put them in his pocket. Every week I would wash the overalls and burn those rags and the next time it would be the same thing. I would have to keep after him to change his clothes. He would go to bed with his shoes on and I would take them off of him when he was too weak to take them off. He saw me use hot salt water gargle, and he put hot water in a teacup with three teaspoonsful of salt and drank that every morning. He would stand around the stove and take the lid off of the vessels, made it very hard for me all the time; looked over my shoulder while I was sewing, half an hour at a time. I handled him just the same as if he was a baby. I would have to stay with him in the closet; he was too weak to help himself. He treated me fine, I never had a cross word from him. My children treated him as nice as anybody could expect, and my oldest girl, ten years old, shaved him. Sometimes he would act like he meant to harm the children whenever they misplaced things. He said there was no blood in his heart. When he came from Marshall, the train carried him through to Calhoun and they sent him back on the train. He was feeble and went to bed. We lived on 160 acres and a pasture of 80

acres; we paid \$300 a year rent and he gave my husband \$6 a month for board. We paid about what farms rent for around there.”

John Duber testified: “I live five and a half miles from the Stohrs. Mr. Schieberl took dinner at my house on his way to Marshall; he ate some, but he vomited.”

John Stoddard testified: “I knew Schieberl thirty-two years. Was intimately acquainted with him; often at my house; was around my shop frequently. He was at my house about two months before he died. He got feeble in body, but could converse sensibly. His mental condition was all right. He would talk about business and how it used to be in other days. He took an interest in my affairs and was glad I was going well. He came regularly to church every two weeks until two months before he died.”

Henry Ficken testified: “I lived three-quarters of a mile from Schieberl. I knew him forty-one years. He would come to my place often, but of late years he got too feeble. I saw him in May before he died. I bought his rent corn and he would require me to pay the money to him. I never saw any indications that his mind was unsound. When we met in the last few years we talked little except to greet each other. He complained of getting old and feeble and about his heart.”

Joseph Schmelier testified: “I saw Schieberl pretty often the last five years. We didn’t have much conversation. I talked with him before he went to Marshall. He said he had only one child, and that was Henry and that he would give Henry all he had. He told me that three or four times. He had a good mind.”

Stephen Schmelier testified: “I saw testator frequently in the last five years, and talked to him a little. He had good health. Before he went to Marshall in 1908, he said he only had one son, and that was Henry,



and that he would give Henry all he had. He had a good mind."

Martin Medek testified: "I knew Schieberl from the time I was a boy. He often came to my house. The last two or three years he was like the average man of his age. There is no smarter man of his age than he was. He talked well of Henry."

George Schuber testified: "I saw Schieberl at church often and talked with him. There was nothing wrong with his mind. At church a month or two before he died he wanted me to buy the farm I live on."

George R. Bellew testified: "I live on one of Schieberl's places. I moved on the farm in February, 1909. He never came on the place while I was there. I made the contract of rental with him. He seemed capable of looking after his own interests. He had me furnish some work and material and he paid me after I did the work."

Margaret Smazel testified: "I have lived at Cole Camp thirty-three years and talked with Schieberl. His mind was all right."

Martin Schieberl testified: "I have lived in Boonville since 1830. I am a brother of the testator. In 1908 when he went to Marshall, I fixed a suit that I made for him twenty years ago. I dyed it. I also made a \$25 suit for him and he paid me. He staid perhaps six days. He went to see an old sawmill friend while with me. On his way back from Marshall he came to my shop carrying his satchel. I saw nothing wrong with his mind. Before that he was at my house on his way to Marshall. I watched him to see if there was anything wrong. I took him to Marshall not because he needed me, but because I wanted to see his son Henry."

During his cross-examination the following occurred:

"Q. Did you talk to Henry about the will? A. Why, only asked him about the will."

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"Q. Did Henry tell you his father had left him everything, himself? A. Why, I don't know, probably he did say so.

"Q. He said that he left him the farm, all the land? A. Why he—

"Q. Nearly everything? A. Why, he didn't say everything; he said he left him—now, how much was it?—he said he left him half the land, I think; I forget things like that.

"Q. You asked him how he came to do it; you asked him what made his father leave him all of it? A. Well, maybe I did; I don't know exactly.

"Q. Well, you did, didn't you? You and Henry talked about it; now did Henry tell you at that time that he dictated that will? A. No, sir; I never said that; he never said dictated; that isn't so.

"Q. What did he say? A. Oh, no.

"Q. What did he say, if he didn't say dictated? A. Yes, sir; I have noticed myself that people didn't seem to understand my brother; couldn't understand my brother and Henry didn't understand his papa; and so he made his lawyers, whoever it was that made the will, understand what his father meant.

"Q. That is what Henry told you; he said he interpreted? A. I don't know what he said; I suppose he did.

"Q. He said he interpreted for his father, the will; ain't that what he said? A. Well, not necessarily.

"Q. Well, what was it, now? Tell the jury what he did say about interpreting that will. A. Well, that is all I have to say.

"Q. I am asking you about what Henry told you, about interpreting the will. A. Well, he only said some words what—some words they couldn't exactly understand right well, that Henry would tell them what he means; but that was no interpretation."

E. G. Utz testified: "I live at Marshall and am a carriage maker. Henry Schieberl has been in my employ as a blacksmith for nearly eighteen years. Whenever his father came to see him, he (the father) would come to my shop. I met and talked with him the last time he was there in 1908. I didn't notice a thing wrong with him. Our principal talk was about the shop work. He would sometimes advise me how to do with the work."

Homer Hatton testified: "I am employed at the Saline carriage works in Marshall, the same place where Henry Schieberl works. I knew Henry's father. I saw and talked with him nearly every day at the shop when he was at Marshall in 1908. His mind was sound."

Dr. M. F. Chastain testified: "I have practiced medicine nearly fifty years. I was postmaster at Marshall in 1908. I met John Schieberl at Utz's shop in 1908 several times. We had considerable conversation. Once he had me go to Mr. Ferrell's office to fix up his pension papers. We talked about people I knew in Benton county. I regarded him as being mentally normal."

Henry Schieberl testified: "I have lived at Marshall eighteen years. I never called my father a s— of-a-b—. I never had any trouble with him. In eighteen years he visited me four times. In 1908 he came in June and staid until the middle of August. I didn't see anything wrong with his mind. I was present at Mr. Rector's office when the will was made, but not all the time. I didn't use any influence with him to get him to make the will. I didn't say a word about dictating the will. I went with my father to Mr. Rector's office. I had been there in the morning to make a date at father's request. He didn't know Rector. I am not worth more than \$2000."

Wm. Schurman testified: "I have lived at Cole Camp over fifty years. I saw Schieberl on the street and at church the last five years. I didn't notice anything wrong with his mind."

The real estate owned by testator at the time of his death was worth about \$15,000.

At the close of all the evidence the defendant asked a peremptory instruction to the jury to sustain the will, which was refused. There was no instruction withdrawing the question of undue influence, but, on the other hand, there was no instruction submitting that issue to the jury.

The court gave for the plaintiffs the following among other instructions:

"4. The jury are instructed that if they find that the provisions of the will are grossly unequal and discriminatory, in favor of Henry J. Schieberl, and that such inequality and discriminations have not been explained or accounted for by the proponents of the will or otherwise, then you are instructed that such inequality and discriminations may be considered by you, as tending to show want of capacity to make a valid will, but for that purpose only."

And refused the following among other instructions asked by defendant:

"1½d. The court instructs the jury that old age, sickness and bodily disease and infirmities, alone, furnish no evidence of mental incapacity of the testator; and unless you find from the evidence that the testator's mind was so unsound that he could not understand the act he was performing, the property he possessed, the disposition he was making of it, and the persons or objects of his bounty, you cannot find against the will, on the ground of mental incapacity."

I. Appellant says that the trial court should have given the peremptory instruction to find in favor of

Aged  
Testator:  
Unequal  
Distribution.

the will. That raises the question both as to testamentary capacity and as to undue influence. In this case those two questions are so intermingled and interdependent that we deem it best to consider them together.

We are cited to a long list of cases in which it was held that there was no satisfactory and substantial testimony tending to show testamentary incapacity. At the head of that list, as cited, is *Winn v. Grier*, 217 Mo. 420. In that case, old age, disease, peculiarities, eccentricities, absent-mindedness, forgetfulness, and the opinions of witnesses that his mind was unsound, were relied upon to impeach the will. It was held that all those were insufficient to take the case to the jury. But there were

Testamentary  
Capacity.

two facts in that case which make a wide gulf between it and the case in hand: First, the evidence for the plaintiffs in that case showed that *the testator continued to transact his business in the usual way until long after the will was written*; second, the testator, so far as the evidence showed, dictated his will independently of any one, and had it witnessed by men one of whom had long known him in business, and both witnesses clearly testified as to his mental capacity, and that will showed that the testator had the business "fully in hand" (l. c. 456).

Ordinarily it is vain to say that a man is not mentally capable of attending to his usual business when he is, at that very time, engaged in doing his usual business in the ordinary way with reasonable success. So it will not ordinarily avail to say that a testator did not have testamentary capacity when the undisputed evidence shows that, unassisted and independently so far as declaring his purpose is concerned, he made a will which measured up to the character of "a rational act rationally done."

In all cases cited by appellant as above stated one or both the above propositions have been the bulwarks

behind which the will has stood secure. It may be conceded that those propositions are not always and alone the determining factors in a will contest. But ordinarily they are the pivotal facts which determine whether the will should stand. On the other hand, when there is substantial evidence showing that, on account of mental failure, the testator had ceased attending to his business, then the question of mental capacity must go to the jury. Likewise, when there is substantial evidence showing that the testator did not act independently in making the will, but that his will was controlled by the overpowering will of another, or that the will as made was not a rational act, then there is an issue for the jury to try.

We will not rehearse the evidence in this case, but there is substantial evidence showing that for the last three years of his life, and for two years before the will was written, the testator had, on account of mental incapacity, ceased to attend to his business. There is evidence to the contrary, but that question must be settled by the proper triers of the facts. Neither of the subscribing witnesses had any acquaintance with the testator prior to the making of the will. The defendant made the appointment with Mr. Rector for the writing of the will and was present when it was written. His uncle, who was his witness, testified that he and the defendant had a talk about the making of the will in which talk defendant told about making plain to the lawyer what his father meant at the time the will was written.

In *Turner v. Anderson*, 236 Mo. l. c. 539, it was said: "There is not a particle of testimony that Mrs.

Anderson was instrumental in procuring or drawing the 1905 will or in anywise hovered over the transaction." Mrs. Anderson was the wife of the testator in that case and the principal beneficiary under the will. In this case the testator, with much assistance on the journey, ar-

Undue  
Influence.

rived at defendant's house in June. After being there about two months, he went with the defendant and made his will giving to defendant nearly all his property, and at once went back home to be cared-for until his death by the daughter whom he had in a large measure disinherited. The facts in the case including the terms of the will itself made an issue as to undue influence.

II. Instruction 4 given for the plaintiff was clearly erroneous. It singled out the fact of the inequality of the children under the will and called the attention of the jury to it. Such an instruction was condemned in *Hughes v. Rader*, 183 Mo. 711.

Erroneous  
Instruction:  
Unequal  
Distribution.

III. Instruction 1½d asked by defendant was properly refused. It singles out facts for the attention of the jury.

IV. We will not decide, on the record as made, whether the court committed error in sustaining objection to the question asked of the subscribing witness Ferrell as shown in the above statement. As the case must be retried, we are of the opinion that the subscribing witness should be permitted to state on what facts his opinion as to testator's mental capacity is based.

The judgment is reversed and the cause remanded. *Williams, C.*, concurs.

PER CURIAM.—This cause coming into Banc on a dissent, on a new hearing there the majority of the court (*Lamm, C. J., Bond, Walker, and Faris, JJ.*) are of the opinion that the giving of instruction 4 for contestants was reversible error; this for reasons given by *Graves, J.*, in his dissenting opinion for holding it error but not reversible error. The majority of the court concur only in the result reached in the Commissioner's opinion and not in all the reasoning; *Brown,*

*J.*, concurs in the Commissioner's opinion *in toto*; *Graves, J.*, dissents in a separate opinion in which *Woodson, J.*, concurs. The judgment is therefore reversed and the cause remanded.

GRAVES, J.—I do not concur with our learned Commissioner in the result reached in this case. The question of undue influence was abandoned when the contestants failed to ask an instruction on that branch of their case, and for present purposes need not be considered.

I agree with the Commissioner that the giving of instruction 4 for the plaintiffs was error. Gross inequality in the distribution of an estate is a circumstance which, when coupled with other circumstances, may tend to show mental incapacity, but standing alone it has no such tendency. The instruction should have coupled gross inadequacy in the manner here suggested.

Instruction No. 1½d was properly refused. Evidence of old age, sickness, bodily disease, and infirmities are all matters which are to be considered by the jury in determining the mental capacity of the testator. It is not always that a testamentary mind is found in an aged, decrepit, and infirm body. To say the least, it is common knowledge that the physical condition often affects the mind, and a jury has the right to consider the physical condition in determining the mental condition.

I think, however, the result reached by the opinion is wrong. The evidence so conclusively shows mental incapacity, that I do not believe the defendant has been harmed by this erroneous instruction 4. I think the verdict and judgment *nisi* is so clearly for the right party that it should be affirmed, and I so vote. *Woodson, J.*, concurs in these views.





# INDEX.

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## ACTIONS.

1. **Parties: Bound by Prior Adjudication.** As regards the subject-matter, parties to a prior suit and their privies are concluded, in a second suit, as to all matters which were or might have been submitted to the court for its consideration on the issues in the first case. *Stone v. Railroad*, 61.
2. **Breach of Contracts: Employment: Indeterminate Term: Termination: Abuse of Discretion.** A petition which charges that the period of plaintiff's employment as a member of a college faculty was indeterminate; that is to say, that it was for a period of one year, with the understanding and agreement that he would be retained at the discretion of the board of trustees beyond said first year without any formal employment or renewal of said contract if his educational work was satisfactory and no personal objections could be urged, and that said board by its articles of association and by-laws could remove after said year any instructor when in the judgment of said board the interest of the college shall require it, and further alleging that said board discharged plaintiff, at the end of the first year, without assigning any other cause except that in the judgment of the board the interest of the college required that his term of service should close, does not state a cause of action for damages for a breach of contract, unless it contains further allegations showing that the board abused its broad discretion to terminate his employment. *Darrow v. Briggs*, 244.
3. ———: ———: ———: ———: ———: **Teaching Theosophy: Newspaper Controversy.** A board of trustees of a college, whose charter and by-laws forbid any religious or political test, either in instruction or in the employment of teachers, but authorizing the "board to remove any teacher when the interest of the college shall require it," does not breach its contract by which plaintiff was employed for one year and permanently thereafter "if after said probationary period of one year there is no difficulty," or abuse its discretion, by terminating plaintiff's employment at the end of one year and assigning no other reason than that the interest of the college requires that his term of service should close, where plaintiff has avowed his devotion to the cult called "Theosophy" and has allowed himself to be drawn into heated newspaper controversies with ministers and others in defense thereof—even though he was nagged into such controversy by the intemperate attacks of said ministers. Such dismissal was in the interest of the college, and was not an abuse of the board's discretion. *Id.*
4. **Conspiracy: Petition: Cause of Action.** In an action on the case in the nature of a writ of conspiracy, the plaintiff may

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**ACTIONS—Continued.**

have judgment against one defendant, although he may have no cause of action against the others. But the action can only be sustained against several defendants where the acts complained of would sustain an action against one of them. An allegation that all defendants conspired together does not authorize the defendant to maintain his action when he could not maintain it against one of them if he were sued alone. A conspiracy of itself furnishes no cause of action, because from the mere forming of it no possible damages can accrue. *Darrow v. Briggs*, 244.

5. ———: ———: ———: **Libels and Slanders: Breach of Contract.** Although the petition contains averments of libels and slanders uttered by one defendant sufficient, if properly pleaded with a proper legal setting, to put him on his defense for actionable utterances, yet if the whole trend of the other allegations is that the other defendants had no part in them, and, not seeking to hold him or the others liable for libel, but, by a charge of conspiracy, seeks to recover damages from the others for a breach of a contract of employment committed by said others, induced thereto by a communication to them of said libels by said defendant, but further charging that said defendant in communicating them to the others acted alone, the petition does not state a cause of action for a conspiracy resulting in plaintiff's discharge from such employment. *Ib.*
6. **Pleading: Incoherent: Non-Understandable.** A petition whose allegations are incoherent and present no understandable issues, is bad on demurrer, since it is still the rule that the pleader is not allowed, by inserting doubtful and uncertain allegations in his pleading, to throw upon his adversary the hazard of correctly interpreting its meaning. *Ib.*

**ADULTERATION OF DRINKS. See Constitutional Law, 2.****APPEALS.**

1. **From Motion Granting New Trial.** It is assumed, and not decided, in this case, where a new trial was granted on account of error in defendant's instructions, that a defendant may appeal from an order granting to plaintiff a new trial (and have the order reversed) because plaintiff at the trial did not make out a case. *Strother v. Milling Co.*, 1.
2. **Appointment of Receiver: Demurrer to Petition.** No appeal lies in the middle of a case, for instance, from a holding that a petition praying for the appointment of a receiver is good on demurrer, without final judgment; but an appeal from the overruling of a motion to revoke an order appointing a receiver, filed after a demurrer to the petition was overruled, asking that said order be revoked, for the reason, among others, that the petition did not state facts sufficient to constitute a cause of action, incidentally involves the sufficiency of the petition, since, if the petition states no cause of action, there was no basis for the court's action in appointing the receiver, and appellant's motion to vacate the order should have been sustained. *Abramsky v. Abramsky*, 117.
3. ———: **Discretion of Court.** Sec. 2018, R. S. 1909, saying that a circuit court may appoint a receiver "whenever such appoint-

## APPEALS—Continued.

ment shall be deemed necessary," vests in the judge a discretion so broad as to be a matter of review on appeal only in case of palpable abuse thereof. *Ib.*

4. **Disregarding Evidence.** Unless the testimony on which the verdict rests is so utterly at variance with the admitted or known physical facts as to require it to be cast aside, it will not be disbelieved by the appellate court. *Rutledge v. Swinney*, 128.
5. **Sufficiency of Evidence: Where it Might Properly Have Been Granted.** Although the Supreme Court may be of the opinion that the trial court, in view of the evidence, should have granted to appellant a new trial, it will not on that ground hold that the trial court committed error if there is substantial evidence of defendant's guilt. The Supreme Court has nothing to do with the credibility of the evidence; its weight and credibility are for the jury, and if their verdict meets the approval of the trial judge the Supreme Court, although the strange fact that the State's main witness is accused's own sister and the deceased was to her unknown may challenge attention, cannot compel a new trial on the theory that her testimony is contrary to human experience, her testimony being substantial and if true showing defendant's guilt, and bearing the earmarks of verity, and there being no showing of enmity or unfriendliness on her part for accused, and nothing in her manner of testifying or conduct from which either could be inferred. *State v. Taylor*, 210.
6. **Bill of Exceptions: Motion for New Trial: Record Proper.** Where the correct bill of exceptions does not contain plaintiffs' motion for new trial or any call for it, appellate review must be limited to the record proper, and where that is free from error the judgment will be affirmed. [See *Haggerty v. Ruth*, 259 Mo. 221.] *McKee v. Donner*, 378.
7. **Credibility of Witnesses: Taking Case from Jury.** The credibility of the witnesses is for the jury, and where in a personal injury action the jury found for plaintiff, whose case was supported by proof, and the court in overruling defendant's motion for a new trial passed upon the weight of the evidence, the defendant cannot upon appeal successfully maintain a contention that the case should have been taken from the jury for failure of proof because, defendant asserts, plaintiff's principal witness showed by his own testimony that he was unworthy of belief. *Holzemer v. Railroad*, 379.
8. **Evidence: Excluded: Offer of Proof.** In order to have the admissibility of excluded evidence considered on appeal the party complaining must have made an offer of proof when objections to the questions were sustained. *Ib.*
9. **——: Hypothetical Question: Objection.** Appellant's contention that the trial court erred in permitting a physician to answer a hypothetical question which appellant asserts was not based upon all the facts shown by the evidence will not be considered on appeal where it appears that that ground of impropriety was not contained in the objection made at the trial. *Ib.*
10. **Material Error: Must Be Believed to Exist.** Error, to be reversible, must be material, and the court must believe it material.

**APPEALS—Continued.**

So that, where defendants demurred to plaintiff's petition, charging it did not state a cause of action, and their demurrer being overruled appealed, the appellate court cannot reverse the trial court's ruling on the theory that it cannot be determined from the petition whether it is a contract under the laws of this State, if it must guess (1) as to whether it states a contract made and delivered in this State or (2) if made and executed in another State whether the law thereof is the same as Missouri's. *Orthwein v. Insurance Co.*, 650.

11. **No Bill of Exceptions: Record Proper: Sufficiency of Petition.** Although the bill of exceptions was filed too late, and accordingly only the record proper can be considered by the Supreme Court on appeal, still the sufficiency of the petition is a proper subject of inquiry. *Shoe Co. v. Wyble*, 675.
12. **Nonprejudicial Error: Refusal to Plead at Arraignment: No Entry of Plea: Appeal.** The failure to enter of record a plea of not guilty where, after the jury had been sworn, defendant was arraigned and refused to plead, stating that he stood on his "constitutional right to a discharge" as having been already placed in jeopardy on the same charge, was an error not prejudicial to the defendant on the merits and therefore (R. S. 1909, sec. 5115) not warranting reversal. [Concurring opinion by GRAVES, J., distinguishing *State v. O'Kelley*, 258 Mo. 345.] *State v. Gould*, 694.

**APPROPRIATION OF PUBLIC MONEY.** See *Schools*.

**ARGUMENT TO JURY.** See *Attorneys*.

**ARRAIGNMENT.**

1. **Jeopardy: Jury Sworn Before Arraignment.** Defendant in a criminal case was not twice put in jeopardy where, after the jury had been sworn, it was discovered there had been no arraignment, and after he had then been arraigned and refused to plead the trial proceeded to his conviction. *State v. Gould*, 694.
2. **Nonprejudicial Error: Refusal to Plead at Arraignment: No Entry of Plea: Appeal.** The failure to enter of record a plea of not guilty where, after the jury had been sworn, defendant was arraigned and refused to plead, stating that he stood on his "constitutional right to a discharge" as having been already placed in jeopardy on the same charge, was an error not prejudicial to the defendant on the merits and therefore (R. S. 1909, sec. 5115) not warranting reversal. [Concurring opinion by GRAVES, J., distinguishing *State v. O'Kelley*, 258 Mo. 345.] *Ib.*

**ASSAULT.**

1. **With Intent to Kill: Self-Defense: Evidence.** After an altercation between defendant and W in a saloon W left and his hat was thrown after him into the street. When W returned with his brother to get his hat, as he says, defendant and his partner came out of the saloon with pistols, and defendant, after reviling the brothers, shot at W but missed him. W threw a rock that struck defendant, and then ran, whereupon defendant shot him twice in the hip. Defendant,

**ASSAULT—Continued.**

however, testified that W struck him with the rock and shot at him before he fired. *Held*, that the question whether defendant acted in self-defense, or, with malice, assaulted W with intent to kill him, was for the jury. *State v. Gould*, 694.

2. ———: **Malice: Instructions: Verdict.** Where the information charged defendant with assault with intent to kill, with malice, and the jury found him guilty as charged, an instruction which told the jury that if they found the facts as stated therein they should find defendant guilty of assault with intent to kill, erred, if at all, in favor of defendant in not requiring the jury to specify in their verdict that the assault was made with malice. *Ib.*
3. **Information: "With a Certain Deadly Weapon."** The use of the word "with" before the words "a certain deadly weapon," in an information charging assault with intent to kill, does not vitiate the information. *Ib.*

**ATTORNEYS.**

1. **Negligence: Loss of Leg: Improper Remarks of Counsel: Verdict: Remittitur.** The plaintiff, a motorman employed by defendant, lost a leg as a result of a rear-end collision with a car which he alleges burned no signal lights behind. His petition asked for \$50,000 damages, and an instruction authorized the jury, if they should find for him, to assess the damages at "not to exceed" that sum. Defendant's employees fully supported the plaintiff as to the facts of defendant's negligence. Plaintiff's counsel in his argument asked the jury to imagine as plaintiff a female passenger on the car, and when an objection was sustained to that he turned to picture plaintiff's battle with defendant's legal department and claim agents. An objection to that was overruled, and then counsel, until stopped by the court, argued about the objections, once stigmatizing them as "tricks of the trade." The jury returned a verdict for \$20,000, and judgment was entered for \$15,000 after compulsory remittitur of \$5000. *Held*, that, although the conduct of plaintiff's counsel was most reprehensible, yet, since it seems plaintiff would have had a verdict in any event, it is not reversible error; but in view of the fact that the court has hitherto refused to affirm judgments for more than \$10,000 for the loss of a leg, counsel's misconduct affords ground for requiring a further remittitur for \$5000. *Kinney v. Railroad*, 97.
2. **Argument of Counsel: Calling Claim Agent a Ghoul.** There was no error in plaintiff's counsel in his argument calling defendant's claim agent a ghoul, when speaking of his having visited the hospital and obtained a statement from plaintiff two days after the accident in which plaintiff had lost a leg. *Ostertag v. Railroad*, 457.
3. ———: **Improper: Considered in Reducing Verdict.** While the improper argument of plaintiff's counsel is not reversible error in this case, it is taken into consideration in deciding whether or not the verdict is excessive. *Ib.*

**BALLOT LAW, BLANKET.** See Constitutional Law, 6 to 8.

**BILL OF EXCEPTIONS.** See Exceptions.

**BREACH OF CONTRACT.** See **Contracts.**

**CAUSE OF ACTION.** See **Actions, Pleading.**

**CHARITIES.**

1. **Will; Trust; Gift to Church.** A gift by will to a trustee, for the "purchase, construction, furnishing, maintenance and repair" of certain parsonages and churches, and "for the general advancement of Christianity," is void. *Sandusky v. Sandusky*, 351.
2. **——: Void Clause; Residuary Estate.** Where a bequest in a will is declared void, the will is construed as though that item were not in it, and the amount thereof passes under the residuary clause. *Ib.*

**CITIES.**

1. **Road and Bridge Taxes: Collected by township: Division with City.** The amendment of 1908 to section 22 of article 10 of the Constitution gave to township boards in counties having township organization the right to levy a tax of twenty-five cents on the hundred dollars' valuation for road and bridge purposes, to be used for no other purpose; and the Legislature has no authority to enact a statute taking from the township any part of the tax so collected, and any statute that authorizes a division of said taxes with a city situated within the township would be unconstitutional; and Sec. 11767, R. S. 1909, authorizing such division, is unconstitutional. *Lamar Township v. Lamar*, 171.
2. **Paid to City by Mistake of Law.** A payment of road and bridge taxes belonging to a township, collected by a township collector and the county treasurer as *ex officio* county collector, made to the treasurer of the city situated in said township, under the mistaken view that under the law said taxes belonged to the city, is no bar to a recovery by the township of the money so paid. The rule that a payment made in mistake of law cannot be recovered, does not apply to a municipality. [Distinguishing *Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264, and *State ex rel. v. Hawkins*, 169 Mo. 1. c. 618.] *Ib.*
3. **Payment: Mistake of Law: Public Officer.** A public officer, charged with the collection of public taxes, is not a general agent of the municipality, but only an agent for the purposes defined by law, and of the limitations of his agency the public is bound to take notice. He cannot give away county funds, or disburse them contrary to law, and any payment of them made by him, unless authorized by valid law, even if made under the mistaken and honest belief that the law authorizes it, is not binding upon the municipality, unless the element of estoppel or some other inexorable principle of law intervenes to bar the municipality's right to recover back the money so paid. *Ib.*

**CLUBS.** See **Corporations.**

**CONSOLIDATED SCHOOL DISTRICTS.**—See **Schools.**

## CONSPIRACY.

1. **Petition: Cause of Action.** In an action on the case in the nature of a writ of conspiracy, the plaintiff may have judgment against one defendant, although he may have no cause of action against the others. But the action can only be sustained against several defendants where the acts complained of would sustain an action against one of them. An allegation that all defendants conspired together does not authorize the defendant to maintain his action when he could not maintain it against one of them if he were sued alone. A conspiracy of itself furnishes no cause of action, because from the mere forming of it no possible damages can accrue. *Darrow v. Briggs*, 244.
2. ———: ———: **Libels and Slanders: Breach of Contract.** Although the petition contains averments of libels and slanders uttered by one defendant sufficient, if properly pleaded with a proper legal setting, to put him on his defense for actionable utterances, yet if the whole trend of the other allegations is that the other defendants had no part in them, and, not seeking to hold him or the others liable for libel, but, by a charge of conspiracy, seeks to recover damages from the others for a breach of a contract of employment committed by said others, induced thereto by a communication to them of said libels by said defendant, but further charging that said defendant in communicating them to the others acted alone, the petition does not state a cause of action for a conspiracy resulting in plaintiff's discharge from such employment. *Ib.*

## CONSTITUTIONAL LAW.

1. **Road and Bridge Taxes: Collected by Township: Division with City.** The amendment of 1908 to section 22 of article 10 of the Constitution gave to township boards in counties having township organization the right to levy a tax of twenty-five cents on the hundred dollars' valuation for road and bridge purposes, to be used for no other purpose; and the Legislature has no authority to enact a statute taking from the township any part of the tax so collected, and any statute that authorizes a division of said taxes with a city situate within the township would be unconstitutional; and Sec. 11767, R. S. 1909, authorizing such division, is unconstitutional. *Lamar Township v. Lamar*, 171.
2. **Nonalcoholic Drinks: Adulteration: Saccharin.** The statute (Laws 1911, p. 61) prohibiting the making or selling of nonalcoholic drinks adulterated with saccharin is unconstitutional. Whether saccharin is deleterious to health or not, it is an arbitrary discrimination to prohibit its use in nonalcoholic drinks and not in other foods and drinks. If the Legislature intended to prevent the use of saccharin in nonalcoholic drinks, not because it is deleterious, but because it sweetens, then there is an arbitrary discrimination in favor of those who sweeten such drinks with sugar. If the Legislature regarded saccharin as deleterious to health, it should have excluded it from all foods and drinks, and not merely from nonalcoholic drinks. If the purpose was merely to prevent the sweetening of nonalcoholic drinks, it should have prohibited the use of any kind of sweetening in such drinks. *State v. Bottling Co.*, 300.
3. **Dealing in Options: Sec. 4781, R. S. 1909: Repeal of Statutes.** Section 4781, R. S. 1909, a part of the law against option dealing enacted in 1889, was not repealed by the



## CONSTITUTIONAL LAW—Continued.

enactment in 1907 of Sec. 4776, a part of the bucket-shop law. The sections have distinct offices to perform, and the enactment of the one had no effect upon the other. *State v. Long*, 314.

4. ———: Sec. 4782, R. S. 1909: Repeal of Statutes. Section 4782, R. S. 1909, prohibiting the keeping of a place for option dealing, being practically the same as Sec. 3 of the bucket-shop law of 1887, the former superseded the latter, and the express repeal of Sec. 3 in 1903 did not operate as a repeal of Sec. 4782. *Ib.*
5. ———: Statutes: Constitutional. Sections 4780, 4781 and 4782, R. S. 1909, prohibiting dealing in options or the keeping of a place for that purpose, are constitutional. *Ib.*
6. Statute: Repealing Statute Unconstitutional. If an ostensible statute attempting to repeal certain sections of the Revised Statutes is unconstitutional and void, those sections, upon an adjudication that said repealing statute is void, are left in existence as live law. *State ex rel. v. Drabelle*, 515.
7. Unconstitutional Statute: Blanket Ballot Law: Constitutional Majority. A bill which failed to obtain a majority of all the members elected to either house of the General Assembly, as shown by a count of the recorded vote in the journal of that house, never became a law, although signed by the presiding officer of each and approved by the Governor. *Ib.*
8. ———: ———: ———: Count: Members Voting Aye as Shown by Journal. The Constitution (Sec. 31, art. 4) says that "no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of members voting for or against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor." Where, therefore, the whole number of members of the House was 142, a constitutional majority being 72, and the journal of the House in which the ayes and noes were recorded shows only 71 ayes for a certain bill, that bill never became a law, although the journal recites it had received a constitutional majority, and had been signed by the presiding officers of the House and Senate and approved by the Governor. All those constitutional requirements are essential prerequisites to the validity of a law, and one is just as essential as another; and since the Constitution says that a majority of the members of each house shall be recorded on the journal as voting in its favor, unless the journal shows that fact the bill never became a law. Nor can recitals found in the journal to the effect that the bill received a constitutional majority be held to either dispute the recorded vote, or to weaken its effect to the extent of introducing doubt or uncertainty which would preclude courts from interfering. *Held*, by GRAVES, J., dissenting, with whom WOODSON, J., concurs, that as the Constitution provides, in the same article, that no bill shall become a law until the same shall have been signed by the presiding officer, and that before he shall affix his signature he shall suspend all other business, "declare that such bill will now be read, and that, if no objections be made, he will sign the same to the end that it may become a law," and that "if no objection be made" he shall, in the presence of the House,

## CONSTITUTIONAL LAW—Continued.

in open session, and before any other business is entertained, affix his signature, "which fact shall be noted on the journal," and also provides that if any member shall object "that any particular clause of this article of the Constitution has been violated in its passage, such objection shall be passed upon by the House, and if sustained, the presiding officer shall withhold his signature," and that when a bill shall have been so signed in both houses, and approved by the Governor, it "shall become a law," a bill which by the journals is shown to have been signed by the presiding officers of both houses without any objection having been made, and approved by the Governor, should be held to be a law, although a count of the ayes and noes as recorded in the journal of one house shows a majority of the members elected thereto did not vote in its favor; that no objection being offered is strong evidence that no objection in fact existed; and that the provision that any "such objection shall be passed upon by the house" means that it is for the legislative body to adjudicate the question of whether a bill has been constitutionally passed, and that the House, having in this case adjudicated that the bill was legally passed, as is shown by its journal record that it received a "constitutional majority," the court cannot go behind such adjudication.

*Held*, also, that a bill properly attested by the presiding officers of the two houses and approved by the Governor, cannot be impeached in a court by a resort to the journal of one of them. That is the positive trend of modern adjudications, and should certainly be the rule in this State in view of our constitutional provision that "such objection shall be passed upon by the house."

*Held*, also, that if the journal impeaches itself, one part showing the bill did pass and another that it did not receive the necessary constitutional majority, the courts cannot interfere, since the rule everywhere accepted is that if doubt exists as to whether a bill received the necessary number of ayes that doubt must be resolved in favor of the due attestation of the presiding officers and the approval of the Governor; and in this case, not only does the journal say that the bill "was passed" and the memoranda indorsed on the bill say that it was "duly passed," and those recitals are impeached by a count of the names of those voting "aye" recorded in the journal, which shows 72 "ayes" (a bare constitutional majority), whereas by counting the names only 71 are found to have so voted, but it also shows that one member is recorded as voting both "aye" and "no," and therefore the journal in the most positive way impeaches itself. *Ib.*

9. **Title: Consolidated School Districts.** The title of an act which is, "An act to provide for the organization of consolidated schools and rural high schools and to provide State-aid for such schools," does not contain two subjects, and does not violate section 28 of article 4 of the Constitution. It but deals with two phases of the same subject, namely, the organization of school districts and State-aid thereto, but in its entirety relates to but one subject. *State ex rel. v. Gordon*, 631.
10. **State-Aid: Appropriation: Aided by Other Acts.** An act which attempts to grant State-aid to consolidated schools and rural high schools and provides that, when certain conditions

## CONSTITUTIONAL LAW—Continued.

have been complied with, certain sums of money shall be paid to the district out of the State Treasury, and that the State "shall make adequate appropriations for carrying out" said provisions, must be read in connection with the biennial school appropriation bill; and if when that is done, both together constitute a "regular appropriation made by law," the act will not be held to be violative of section 43 of article 4 of the Constitution. *State ex rel v. Gordon*, 631.

11. ———: **Grant of Public Money.** The clause of the Constitution (Sec. 46, art. 4) that prohibits the Legislature from making any grant of public money "to any individuals, municipal or other corporation," does not have any reference to corporations belonging wholly to the State, and does not prohibit the grant of State aid to consolidated schools or rural high schools. *Ib.*
12. ———: ———: **Ordinary School Moneys.** Sections 2 and or article 4 of the Constitution are applicable to the ordinary school funds to be distributed to the ordinary public schools, and not to these funds which the State may specially appropriate to other schools. *Ib.*
13. ———: **General Revenue: Any Public Purpose.** General revenue, collected by the State, by taxation, from all parts thereof, is not the private property of any county or school district, but is the property of the State, and may be appropriated and used for any governmental purpose which the Legislature deems wise; for instance, it may be used in aid of the establishment and maintenance of consolidated schools or rural schools, whose organization the Legislature has authorized. *Ib.*
14. **Insurance Policy: Wife as Beneficiary: Vested Right: Constitutional Statute.** A wife named as beneficiary in a life insurance policy issued on the life of her husband, upon which he alone paid the premiums, has no such vested rights therein as renders unconstitutional a statute which divests her of all interest therein in the event of her death or divorce before the death of the husband; even if spoken of as vested, they are subject to be divested on the condition subsequent. That statute must be read into the policy and become a vitally operative part thereof, as much so as if its very terms were read into it; and it is applicable to all divorced wives and to all insurance policies issued after its enactment. And hence there is nothing in its provisions permitting the husband, who has alone paid all the premiums on a policy issued on his life, to name another beneficiary, in the event of the wife's divorce, that deprives her of her property without due process of law, or denies her the equal protection of the laws, or authorizes an unreasonable seizure of her property, or its taking for a private use, or violates any constitutional provision against special or class legislation. *Orthwein v. Ins. Co.*, 650.
15. ———: **Freedom of Contract.** Freedom to contract as one pleases is not an element of the life insurance business; on the contrary, the right to make insurance contracts is subject to statutory regulation. *Ib.*

## CONTRACTS.

1. **Breach: Employment: Indeterminate Term: Termination: Abuse of Discretion.** A petition which charges that the period of plaintiff's employment as a member of a college faculty was indeterminate; that is to say, that it was for a period of one year, with the understanding and agreement that he would be retained at the discretion of the board of trustees beyond said first year without any formal employment or renewal of said contract if his educational work was satisfactory and no personal objections could be urged, and that said board by its articles of association and by-laws could remove after said year any instructor when in the judgment of said board the interest of the college shall require it, and further alleging that said board discharged plaintiff, at the end of the first year, without assigning any other cause except that in the judgment of the board the interest of the college required that his term of service should close, does not state a cause of action for damages for a breach of contract, unless it contains further allegations showing that the board abused its broad discretion to terminate his employment. *Darrow v. Briggs*, 244.
2. ———: ———: ———: ———: ———: **Teaching Theosophy: Newspaper Controversy.** A board of trustees of a college, whose charter and by-laws forbid any religious or political test, either in instruction or in the employment of teachers, but authorizing the "board to remove any teacher when the interest of the College shall require it," does not breach its contract by which plaintiff was employed for one year and permanently thereafter "if after said probationary period of one year there is no difficulty," or abuse its discretion, by terminating plaintiff's employment at the end of one year and assigning no other reason than that the interest of the college requires that his term of service should close, where plaintiff has avowed his devotion to the cult called "Theosophy" and has allowed himself to be drawn into heated newspaper controversies with ministers and others in defense thereof—even though he was nagged into such controversy by the intemperate attacks of said ministers. Such dismissal was in the interest of the college, and was not an abuse of the board's discretion. *Ib.*

## CONVERSION.

**For Purposes of Distribution: Failure of Trust on Final Distribution.** In 1878 a testator in Maryland devised land in Missouri to A, B, and C, three of his executors, in trust that they or their survivors should sell it in whole or in part, at public or private sale, upon such terms and at such time as they might deem most advantageous for the estate, and pay the proceeds to the executors to be distributed according to the provisions of the will. One-sixth of his estate the testator gave in trust for a daughter during her life, to be conveyed to the daughter's children at her death. The sole surviving trustee was relieved by a Maryland court in 1887, the Missouri land being still unsold, and a trustee was appointed whose attempted conveyance to defendant's grantor failed to pass the title. *Held*, that the power of the trustees appointed by the will was limited to conversion for distribution according to the provisions of the will; and that upon final distribution of the estate, their power over lands still unsold ceased, and the legal title to one-sixth thereof vested in the trustee for the testator's daughter, and after the death of the daughter became vested in her children. *De Lashmutt v. Teetor*, 412.

**CONVEYANCES.**

1. **Swamp Lands: Equitable Title: No Patent.** A purchaser of swamp land who complied with all the requirements of the law relating to the sale of such land (paid the purchase price and received regular receipts of the receiver and register), acquired the equitable title, although, through some fault of the State or county, he received no patent therefor. *Russ v. Sims*, 27.
2. ———: ———: **Notice.** The Register's Book and Receiver's Book, showing that certain swamp land has been entered and paid for by a certain entryman, if kept in the manner required by the various statutes relating to such lands, are notice to the world that the county has sold the land; and a subsequent purchaser from the county purchases subject to the rights of such former purchaser and his grantees. *Ib.*
3. **Foreclosure Deed not Recorded: Purchase of Equity of Redemption.** A recorded deed of trust is constructive notice that the legal title is outstanding in the trustee, and one who, without notice of the foreclosure of the deed of trust, purchases the equity of redemption ten years after the foreclosure but before the recording of the foreclosure deed, is not entitled, in a suit to quiet title, to have the foreclosure deed declared void, although meanwhile he has completed and operated a railroad upon the land in question. *Stone v. Railroad*, 61.
4. **Deed: Delivery: To Third Person for Record: Voluntary Family Settlement.** A mother, by way of voluntary family settlement, made separate deeds to her two children and to her grandchildren, covering in the aggregate all of her real estate. She delivered the three deeds to her son Fred with instructions to record them. He recorded his own, and that of his brother was afterward recorded, but that to the grandchildren he returned to the grantor, in whose trunk it was found at her death ten years later. *Held*, a good delivery of the deed to the grandchildren, and, this being a case of family settlement, and the grandchildren having been minors at the time of the delivery, their acceptance is presumed, and the title passed to them. *Fenton v. Fenton*, 202.
5. **Evidence: Patents to Land: Certification of Copies.** Copies of land patents certified by the Recorder of the General Land Office at Washington, are receivable in evidence. *Chilton v. Nickey*, 232.
6. **By Married Woman with Husband: Fraud: Evidence.** Evidence held to support a finding that a conveyance of land was valid, having been signed and acknowledged by the grantor, a married woman, without fraud or coercion. *Nelson v. Alport*, 319.

**CORPORATIONS.**

1. **Sale: Necessary Elements.** The sale of personal property is a transfer of the absolute or general property in the thing for a price in money. To constitute a valid sale there must be a concurrence of certain essential elements: First, parties capable of contracting, a seller and a buyer, either of whom may be an artificial person having a legal existence or a natural person, and, although such natural person may buy from said artificial person and be enabled to so buy only

## CORPORATIONS—Continued.

because he is a member thereof, yet he is still a natural person, because he has no such individualized ownership in the concrete property of the corporation as will enable him to legally appropriate it except by purchase; second, mutual consent, that is, a power and a purpose to sell by the seller, and a willingness to buy on the part of the purchaser; third, a thing being sold, the absolute or general property in which is capable of being transferred and is transferred from the seller to the buyer; and, fourth, a price paid or promised for such thing. *State ex inf. v. Athletic Club*, 576.

2. ———: Intoxicating Liquors: By Club to Members. The supply of intoxicating liquors by an incorporated club to its members, within the club building, for a definite price to be paid, is a sale of such liquors, although the club does not sell to any one except members, and does not permit them to pay for same at the time they are ordered or used, but requires the members to sign cards at the time the liquors are received, acknowledging the receipt and stating the price, and to pay for same at the end of the month when all supplies are paid for, and the money is commingled with other funds of the club and used in replenishing its stock of liquors and purchasing other supplies for the use of members. Nor is such transaction rendered any the less a sale by the fact that the liquor is supplied only to members of the corporation, since the corporation or club is one person, and no member or stockholder has any such individualized interest therein as authorizes him to appropriate any part of its assets without paying for them. *Ib.*
3. ———: ———: ———: Corporation. An incorporated social club is a person within the meaning of the corporation laws, and the dispensing of liquors by it to its members for agreed sums of money, although not for profit, is a sale. [To that extent overruling *Bell v. St. Louis Club*, 125 Mo. 308.] *Ib.*
4. ———: ———: ———: No License: Statute. In view of the statute (Sec. 7188, R. S. 1909) declaring that "no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop-keeper," it is unlawful for an incorporated social or athletic club, without first obtaining a license as a dramshop-keeper, to dispense liquors to its members at a price paid or to be paid, whether for profit or otherwise. *Ib.*
5. ———: ———: Implied Powers. Legislative grants of powers to corporations only include such rights and powers as are clearly comprehended within the words of the act creating them or as may be derived therefrom by necessary implication, regard being had to the objects of the grant, and if ambiguities or doubts arise out of the terms used in the statute they must be resolved in favor of the public; and even though it be admitted (which would seem to be judicial legislation) that social clubs may be incorporated under the statutes providing for the incorporation of benevolent, religious, scientific, educational and miscellaneous associations, those statutes cannot be held to imply that an incorporated social club can sell liquors to its members, because the sale of intoxicating liquor is a limited privilege, and an express statute says that "no person shall, directly or indirectly, sell intoxicating liquors

## CORPORATIONS—Continued.

in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dram-shop-keeper," and that such a license can be granted only to "a law-abiding, assessed tax-paying male citizen over twenty-one years of age," and, hence, such a license cannot be granted to a corporation, since it lacks three of the essential elements, namely, age, character and sex, and hence the doctrine of implied powers is wholly inapplicable to this class of corporations when the question arises as to their right to sell such liquors. *State ex inf. v. Athletic Club*, 576.

## COTENANCY.

**Specific Performance: Sale by Heirs: One Heir Willing to Sell.** Evidence showing merely that one of several heirs was conducting negotiations looking to a sale of land held in common, and was willing that it should be sold if the others agreed, does not warrant a decree of specific performance for his share. *Barthel v. Engle*, 307.

## COURTS.

1. **Tax Sale: At No Term of Court.** The Supreme Court takes judicial notice of the terms of the circuit court, and knows that the terms of said court in Pemiscot county in 1879 began on the "second Monday of March and September," and therefore a tax deed reciting that the land was sold "at the November term, 1879, of said court" is void on its face. *Russ v. Sims*, 27.
2. **Receiver: Appointment: Discretion of Court.** Sec. 2018, R. S. 1909, saying that a circuit court may appoint a receiver "when-ever such appointment shall be deemed necessary," vests in the judge a discretion so broad as to be a matter of review on appeal only in case of palpable abuse thereof. *Abramsky v. Abramsky*, 117.
3. **Taxation: Board of Equalization: Supreme Court: Going Behind Records to Strike off Property Wrongly Added.** In a suit for personal taxes the Supreme Court on appeal is not bound by the records of the board of equalization, but may go behind them to strike off property not legally taxable against defendant, which, so far as the records show, was added to the assessment under the guise of increased valuation. *State ex rel. v. Trust Co.*, 448.
4. **Statutes: Construction: Unambiguous.** A plain and unambiguous statute stands on its own reason, and when it is plain and unambiguous courts are not allowed to vary, enlarge or reduce it, or read into it any exceptions or restrictions, or seek for any fanciful public hurts its enforcement may induce, because of speculative theories of their own or apprehension of others. *Orthwein v. Ins. Co.*, 650.

## CRIMINAL LAW.

1. **Larceny: Instructions: "Feloniously."** Where in a prosecution for grand larceny the court instructed the jury to find the accused guilty if they believed from the evidence that he wrongfully took and carried away a pocketbook and money from the possession of M., with the intent to fraudulently

## CRIMINAL LAW—Continued.

convert it to his own use and permanently deprive the owner thereof without his consent, the same being the property of M., the failure to require a finding that accused's intent in taking and carrying away the things stolen was felonious did not render the instruction erroneous. *State v. Ward*, 149.

2. ———: ———: "Without Claim of Right." Where the State's evidence tended to show that the accused picked the pocket of the prosecuting witness like an expert, that he was described to the police by his victim and was taken within an hour and a half with part of the money on him, and where he made no defense at the trial, a failure to require a finding that the taking was without claim of right would not be error, since the facts show there was no such claim. *Ib.*
3. ———: Evidence: Identity of Stolen Bank Notes. Evidence as to the identity of national bank notes found on the accused with those stolen from the prosecuting witness *held* sufficient to take the question to the jury. *Ib.*
4. ———: Instructions: All the Law of the Case: Motion for New Trial: Appeal: Circumstantial Evidence. Although the trial court's attention was at no time specifically called to a failure to instruct on circumstantial evidence, and the motion for new trial merely alleged that the court did not instruct on all the law of the case, still the Supreme Court is bound to see that no injustice is done by such omission, and it is *held*, in a trial for grand larceny, where direct evidence identifies the accused as the person who pressed against the prosecuting witness when his pocketbook was taken, and identifies money found on the accused as part of that then stolen, that an instruction on circumstantial evidence was not required. *Ib.*
5. Verdict: Using Word Information Instead of Indictment. Where the jury in their verdict say they find the defendant guilty "in manner and form as charged in the information," whereas he was tried under an indictment preferred by a grand jury, the mistake of using the word "information" instead of the word "indictment" is not error. The rights of the defendant are not prejudiced by such mistake. *State v. Taylor*, 210.
6. ———: Two Defendants: Joint Verdict: Irregularly Worded. Where two defendants are jointly indicted for the same murder and jointly tried, a verdict reading, "We, the jury, find the defendants guilty in manner and form as charged in the information and assess their punishment at life imprisonment," violates the express letter of the statute (Sec. 5252, R. S. 1909) which says that when several defendants are jointly tried their punishment shall be assessed separately and not jointly; and it is also imperfect and irregular in that it assesses the punishment at "life imprisonment." But such a verdict is tantamount to a general verdict of guilty, which fails to assess any punishment, since the punishment is erroneously assessed. In such case it is competent for the court himself to assess the punishment at ninety-nine years' imprisonment in the penitentiary, as he is authorized by statute to do (Sec. 5254, R. S. 1909), instead of at life imprisonment, as the jury evidently attempted to do. Under such circumstances, the verdict is not reversible error, although the court subsequently granted



## CRIMINAL LAW—Continued.

a new trial to appellant's coindictor, and thereafter he was discharged upon a nolle prosequi. *State v. Taylor*, 210.

7. **Murder: Statement of Coindictor: Failure to Instruct: Collateral Matter.** Where two defendants are jointly indicted and tried for the same murder, it is not error for the trial court to instruct the jury in behalf of appellant that any statement made by his coindictor is not binding upon appellant, (1) if there is no evidence of any statement having been made by said coindictor which tends to connect appellant with their joint case, or (2), even if there is such testimony, unless appellant requests such an instruction, since the matter is a collateral one and is not strictly within the purview of section 5231, Revised Statutes 1909. *Ib.*
8. ———: **Instruction: Wrong Date of Deceased's Death.** Where deceased was found dead on August 8, 1910, and defendants were tried in December, 1912, an instruction telling the jury that if they find and believe that "at any time prior to the filing of the indictment" defendants did strike and beat deceased with a heavy iron bar, "and that within a year and a day thereafter, to-wit, on the — day of August, 1912, he died from the effects of such striking and beating," they should find the defendants guilty, contains only a clerical mistake in stating the date of deceased's death as "on the — day of August, 1912," which is without substance, since the jury are expressly required to find that deceased died within a year and a day after he was assaulted, which cures the palpable clerical error of 1912, and besides, since it is a murder case, it is wholly unimportant when the prosecution was begun, if deceased died within a year and a day after he was assaulted. *Ib.*
9. ———: ———: **Defendant's Failure to Testify: Refusal of Instruction Not to Consider.** It is not reversible error to refuse an instruction asked by defendant to the effect that the jury are not to consider as any evidence of his guilt or innocence the failure of defendant to testify in his own behalf. [Following *State v. Robinson*, 117 Mo. 649.] Neither is it error for the trial court to give such an instruction. [Citing *State v. DeWitt*, 186 Mo. 61.] And it would perhaps be a little fairer to defendant to give such an instruction, if he asks it; but in view of the dark and muddy language of Sec. 5243, R. S. 1909, and the holding in the *Robinson* case, it cannot be held to be reversible error not to give it. *Ib.*
10. **New Trial: As to One Defendant: Not as to Other.** The granting of a new trial to one of two defendants, jointly indicted and jointly tried and jointly found guilty by the same general verdict, is not *ipso facto* a granting of a new trial to the other. *Ib.*
11. ———: **Sufficiency of Evidence: Where it Might Properly Have Been Granted.** Although the Supreme Court may be of the opinion that the trial court, in view of the evidence, should have granted to appellant a new trial, it will not on that ground hold that the trial court committed error if there is substantial evidence of defendant's guilt. The Supreme Court has nothing to do with the credibility of the evidence; its weight and credibility are for the jury, and if their verdict meets the approval of the trial judge the Supreme Court, although the strange fact that the State's main witness is ac-

## CRIMINAL LAW—Continued.

cused's own sister and the deceased was to her unknown may challenge attention, cannot compel a new trial on the theory that her testimony is contrary to human experience, her testimony being substantial and if true showing defendant's guilt, and bearing the earmarks of verity, and there being no showing of enmity or unfriendliness on her part for accused, and nothing in her manner of testifying or conduct from which either could be inferred. *Ib.*

12. **Information: "With a Certain Deadly Weapon."** The use of the word "with" before the words "a certain deadly weapon," in an information charging assault with intent to kill, does not vitiate the information. *State v. Gould*, 694.
13. **Assault With Intent to Kill: Self-Defense: Evidence.** After an altercation between defendant and W in a saloon W left and his hat was thrown after him into the street. When W returned with his brother to get his hat, as he says, defendant and his partner came out of the saloon with pistols, and defendant, after reviling the brothers, shot at W but missed him. W threw a rock that struck defendant, and then ran, whereupon defendant shot him twice in the hip. Defendant, however, testified that W struck him with the rock and shot at him before he fired. *Held*, that the question whether defendant acted in self-defense, or, with malice, assaulted W with intent to kill him, was for the jury. *Ib.*
14. **Jeopardy: Jury Sworn Before Arraignment.** Defendant in a criminal case was not twice put in jeopardy where, after the jury had been sworn, it was discovered there had been no arraignment, and after he had then been arraigned and refused to plead the trial proceeded to his conviction. *Ib.*
15. **Nonprejudicial Error: Refusal to Plead at Arraignment: No Entry of Plea: Appeal.** The failure to enter of record a plea of not guilty where, after the jury had been sworn, defendant was arraigned and refused to plead, stating that he stood on his "constitutional right to a discharge" as having been already placed in jeopardy on the same charge, was an error not prejudicial to the defendant on the merits and therefore (*R. S.* 1909, sec. 5115) not warranting reversal. [Concurring opinion by GRAVES, J., distinguishing *State v. O'Kelley*, 258 Mo. 345.] *Ib.*
16. **Date of Crime: Instructions: Information and Proof.** Where the jury heard the information read, charging that the offense occurred December 19, 1912, and the evidence on both sides showed its occurrence on that date (a time within three years of the filing of the information), an instruction was not erroneous which laid the crime as within three years next before the filing of the information but gave no date. *Ib.*
17. **Assault with Intent to Kill: Malice: Instructions: Verdict.** Where the information charged defendant with assault with intent to kill, with malice, and the jury found him guilty as charged, an instruction which told the jury that if they found the facts as stated therein they should find defendant guilty of assault with intent to kill, erred, if at all, in favor of defendant in not requiring the jury to specify in their verdict that the assault was made with malice. *Ib.*

**CRIMINAL LAW—Continued.**

18. **Holidays: Valid Sentence and Judgment.** Judgment and sentence entered on a legal holiday other than Sunday are valid. *State v. Gould*, 694.

**DAMAGES.** See *Contracts, Conspiracy, Negligence.*

**DEFENSES.**

**Taxation: Void Levy: Raised by Recipient.** In a suit by a township to recover the amount of road and bridge taxes collected by the township collector and county treasurer as *ex officio* county collector and paid to the city situate within the township, in the honest belief that such taxes belonged to the city, a defense set up by the city that the levies under which the taxes were collected were void, should be stricken out, on motion. The city cannot justify its right to hold money collected as taxes, on the theory that the levy under which they were collected was void. *Lamar Township v. Lamar*, 171.

**DEMURRER.**

1. **Evidence: Sufficiency.** In passing upon the sufficiency of the evidence, when challenged by demurrer, the general rule is that plaintiff's evidence (if not impossible or opposed to the physics of the case or entirely beyond reason) is taken as true and plaintiff is further entitled to the benefit of every reasonable inference of fact arising on all the proof. But this does not relieve plaintiff from the necessity of producing substantial testimony to prove the issues involved. A mere glimmer or spark, a mere scintilla, will not do. *Near v. Railroad*, 80.
2. **Pleading: Incoherent: Non-Understandable.** A petition whose allegations are incoherent and present no understandable issues, is bad on demurrer, since it is still the rule that the pleader is not allowed, by inserting doubtful and uncertain allegations in his pleading, to throw upon his adversary the hazard of correctly interpreting its meaning. *Darrow v. Briggs*, 244.
3. **Venue: Impliedly Admitted by Demurrer.** A demurrer to plaintiff's petition by necessary implication admits the insurance policies sued on are governed by the laws of this State, if it charges specifically, by way of confession and avoidance, (1) that a named statute does not apply to the facts and (2) that, if held to apply, it must be brushed aside as unconstitutional. *Orthwein v. Ins. Co.*, 650.

**DISPENSING LIQUORS.** See *Intoxicating Liquors.*

**DIVORCE.**

1. **Insurance Policy: Wife as Beneficiary: Change: Divorce for Husband's Fault.** Sec. 6944, R. S. 1909, authorizing the husband to designate another beneficiary in a life insurance policy, issued on his life for the benefit of his wife and paid for by him alone, "in the event of the death or divorcement of the wife before the decease of the husband," entitled him to designate another beneficiary whether he or she was found to be the injured party in the suit for divorce, and whether it was brought by him or her. The right is vouchsafed to the husband without regard as to who was adjudged to be at fault in the divorce proceeding.

**DIVORCE—Continued.**

and the statute violates no vested right of the wife, and is constitutional. *Orthwein v. Insurance Co.*, 650.

2. ———: ———: ———: ———. The word "divorcement" used in the statute, means "divorce," and does not imply affirmative action by the husband alone. No other significance is to be given it. Even if it be true that in a Biblical sense the word "divorcement" primarily implied affirmative action by the husband, that fact would have no tendency to prove the word was used in a Biblical sense by the General Assembly when inserted in section 6944. *Ib.*

**DOWER.**

1. **Specific Performance: Diminution.** Where the vendee, under a contract for the sale of the land signed by the vendor alone, is entitled to specific performance, there should be a diminution of the purchase price named in the contract by the present value of the wife's inchoate dower, estimated by the tables of mortality and by the statutes of present values of estates less than a fee. In other words, the contract being for the sale of the property for a named price, and that contract being one which, under the evidence, equity, in the exercise of a sound judicial discretion, should enforce, the vendor should not receive the whole purchase price, and then as a reward for his breach of contract be permitted to keep one-third of the title in a life estate in his family, but the value of that inchoate dower should be calculated in the manner prescribed by statute and deducted from the purchase-price agreed upon, and then the title be decreed to be, upon payment of the balance, in the vendee, subject to the wife's inchoate dower. [*Overruling Aiple-Hemmelmann Real Estate Co. v. Spielbrink*, 211 Mo. 671.] *Tebeau v. Ridge*, 547.
2. ———: ———: **Knowledge That Vendor was Married, etc.** The facts that the vendee at the time that the contract of purchase was signed by the vendor alone did not know that he had a wife; and that the vendor, prior to his refusal to convey the land to the vendee according to the contract, had not requested, and did not intend to request, his wife to sign the deed of conveyance, do not in anywise affect the interest of the wife in the land, nor authorize the court to compel her to convey her dower therein, nor do they preclude the court from decreeing specific performance by a diminution from the purchase price of the value of her inchoate dower. They only go to matters of good faith, as such may affect the vendor or vendee. *Ib.*

**DRAMSHOP LICENSE.** See *Intoxicating Liquors*.

**DRINKS, NONALCOHOLIC.** See *Constitutional Law*, 2.

**EJECTMENT.**

1. **Outstanding Title.** Where the evidence in a suit to quiet title shows that a portion of the land in suit did not, when the suit was instituted, belong either to plaintiff or to defendant, there can be no adjudication as to that portion. *Chilton v. Nickey*, 232.
2. **Limitations: Thirty-one Year Statute: Lawful Possession: Color of Title.** It is not reasonable to presume the defendant,

**EJECTMENT—Continued.**

- who interposed the thirty-one year Statute of Limitations, held possession in good faith under a deed to her deviser concerning which the evidence does not show she had knowledge; and the trial court's finding that said defendant gained lawful possession from such deed was accordingly erroneous. *Abeles v. Pillman*, 359.
3. ———: ———: ———: ———: **Ownership.** The term "lawful possession" used in the thirty-one year Statute of Limitations (R. S. 1909, sec. 1884) does not mean possession based upon ownership of the title to the land—this for the reason that the statute contemplates that the "lawful possession" shall continue for a year after the thirty-year period before the one so having lawful possession becomes *ipso facto* vested with the title of the claimant. It therefore follows that the person in lawful possession must be some one other than the owner. *Ib.*
  4. ———: ———: ———: **What is.** Color of title is not necessary to establish "lawful possession" under the thirty-one year Statute of Limitations. *Ib.*
  5. ———: ———: ———: **Special Findings: New Trial.** Where in ejectment the defendant asserted title to land under the thirty-one year Statute of Limitations, and the court found specially that, since he had color of title, said defendant was in "lawful possession," but it appears upon appeal that the evidence does not support the finding of color of title, the case is reversed and remanded for a new trial, in the course of which evidence may be introduced upon the question whether or not defendant's possession was of such character as to be lawful, under the statute, without color of title. *Ib.*
  6. ———: ———: ———: **No Assessment of Taxes: Non-resident Owner.** Where a defendant in ejectment asserts title to the land under the thirty-one year Statute of Limitations (R. S. 1909, sec. 1884), one requirement of which is that neither the plaintiff nor those under whom he claims shall have paid any taxes on the land for thirty years, the plaintiff will not be excused, no taxes having been paid, by a showing that the record owner was not a resident of the State and that the land was never assessed for taxes, said owner having testified that he had made no inquiry about the land and thought it worthless. *Ib.*

**ELECTION LAWS.** See Legislation.

**EMPLOYMENT, BREACH OF CONTRACT.** See Contracts.

**EQUITY.**

1. **Specific Performance: Inference of Fact: Deference to Chancellor.** Inferences in their last analysis are but presumptions of a milder sort, and presumptions of fact fly away upon the entrance of proof. Where plaintiff swore that he did not know that defendant had a wife at the time the contract of lease with an option to purchase was entered into, and on the other side there are facts from which it could reasonably be inferred that if plaintiff did not know that defendant was married at that time he ought to have known it, the appellate court will defer to the finding of the chancellor on the point. *Tebeau v. Ridge*, 547.

**EQUITY—Continued.**

2. ———: **Evidence: Finding of Facts Not Pleaded.** In a broad sense an equity suit is to be tried *de novo* on appeal; and though the chancellor may have made findings outside both pleadings and proof, yet the judgment will be affirmed if there is enough in the pleadings and proof to fully uphold the decree. *Ib.*

**ESTOPPEL.**

1. **Unoccupied Lands: Limitations.** Where the evidence shows the lands were wild swamp land, covered with timber, uncultivated and in the possession of no one, neither the defense of limitations nor of estoppel is available. *Russ v. Sims*, 27.
2. **Trustee for Life Tenant: Cannot Bind Remaindermen.** A trustee for a life tenant has no more power to bind the remaindermen or their title than the life tenant would have had had there been no trust. Such trustee could not dispose of the remainder by estoppel, or by the ratification of a void deed, any more than she could do it by her own deed. *De Lashmutt v. Teetor*, 412.
3. ———: ———: **Receiving Proceeds of Invalid Sale: Knowledge.** Remaindermen entitled to a fee in certain property discharged from a trust under the will of their grandfather, are not estopped to object to an invalid sale of the land by a substituted trustee because they accepted a partial distribution of the estate, made up in part of the proceeds of such sale, they having had no knowledge of the sale when they received the distribution. *Ib.*

**EVIDENCE.**

1. **Carleton's Abstracts: Original.** If Carleton's Abstract of swamp lands in Pemiscot county is admissible as evidence of title under either act of the Legislature pertaining thereto (Laws 1901, p. 251, or Laws 1907, p. 271), then the original Receiver's Book and Register's Book from which they were made, though for some years not in the courthouse or the possession of the county clerk, are also admissible. *Russ v. Sims*, 27.
2. **Quieting Title: Deed: Made by Order of Court.** In a suit to quiet title a joint deed to the property in dispute made by the owner's assignee in bankruptcy and by a substituted trustee under a deed of trust, was properly admitted in evidence, over an objection that the power of the makers was not shown, where the deed recites that the land was sold under an order of the court in bankruptcy and under the provisions of the deed of trust. *Stone v. Railroad*, 61.
3. ———: **Adverse Possession.** Evidence held insufficient to establish title in defendant by adverse possession. *Ib.*
4. **Negligence: Custom: Pleading.** Where the petition charges common-law negligence in an action by a motorman for injuries received in a rear-end collision, and alleges that the car with which his collided was without rear lights, evidence of a rule and custom of the company to keep a red signal light on the rear of cars at night is admissible, even though such rule and custom be not pleaded. *Kinney v. Railroad*, 97.

**EVIDENCE—Continued.**

5. **Patents to Land: Certification of Copies.** Copies of land patents certified by the Recorder of the General Land Office at Washington, are receivable in evidence. *Chilton v. Nickey*, 232.
6. **Conveyance: By Married Woman with Husband: Fraud.** Evidence *held* to support a finding that a conveyance of land was valid, having been signed and acknowledged by the grantor, a married woman, without fraud or coercion. *Nelson v. Alport*, 319.
7. **Negligence: Going Into Danger: Warning: Question for Jury.** Evidence in an action for damages by one run down by a cable car *held* to show that by the exercise of ordinary care the gripman could have seen plaintiff's danger in time to warn him; and accordingly it was for the jury to say whether the giving of an alarm would have aided in preventing the injury. *Holzemer v. Railroad*, 379.
8. **Hypothetical Question: Objection: Appeal.** Appellant's contention that the trial court erred in permitting a physician to answer a hypothetical question which appellant asserts was not based upon all the facts shown by the evidence will not be considered on appeal where it appears that that ground of impropriety was not contained in the objection made at the trial. *Ib.*
9. **Extent of Injuries: Stone Taken from Plaintiff's Face.** Where the extent of plaintiff's injuries was one of the issues in the case, which was tried about two years after the injury complained of, a stone which a witness claimed he took from plaintiff's face immediately after the accident was properly received in evidence. From it the jury could get a more accurate impression of the original extent of the injuries to plaintiff's face. *Ib.*
10. **Experiments: Preliminary Proof: Causal Conditions.** Before experiments and their results are admissible as proof it must first be shown that causal conditions and circumstances were reproduced substantially as at the original happening. *Ib.*
11. **Excluded: Offer of Proof: Appeal.** In order to have the admissibility of excluded evidence considered on appeal the party complaining must have made an offer of proof when objections to the questions were sustained. *Ib.*
12. **Company's Rule: Point not Presented in Instructions.** Where, in an action for injuries to a switchman run down by an engine behind which he attempted to pass, defendant's evidence was that switch engines in the yard were not required to answer signals with the whistle, and testimony was admitted that defendant had a rule requiring two short blasts of the whistle in answer to any signal not otherwise provided for, error, if any, in the admission of the rule was harmless, since the instructions did not submit any fact involving that rule. *Ostertag v. Railroad*, 457.
13. **Expert Testimony: Hauling Train in Usual and Proper Manner.** The usual and ordinary manner of operating railroad trains is a subject of expert evidence. It is proper to permit the train dispatcher, who had charge of the movement of trains on the division on which one freight train

## EVIDENCE—Continued.

- collided with another, and knew the significance of train orders, signals and switch lights, to testify as to the purpose and meaning of signals, switch lights, dispatches sent and delivered, and the usual and customary manner of running trains at the point of the accident, for the purpose of enabling the court or jury to fully understand the facts in the given case, in order that the appropriate rules of law may be applied thereto. *Finnegan v. Railroad*, 481.
14. **Rules on Time Card: Judicial Notice.** The court will take judicial notice, if the fact does not appear in evidence, that all train operatives carry the current time card of trains, and that the rules printed thereon are ever present with the engineer of a freight train. *Ib.*
  15. **Freight Trains: Ruling Signals: Observance and Abandonment.** The ruling signals by which an engineer of a freight train was to be guided in approaching a junction, under a wholesome and common-sense interpretation of the company's rules in this case, are held to have been the initial switch lights and the light displayed in the semaphore; and whether or not those paramount rules, and others read in connection therewith, were observed, either by a compliance with their terms or in such a manner as to work their abandonment or abrogation, was a matter for the jury, since there was evidence upon which either theory might have been based. *Ib.*
  16. **Verdict: Evidence of Prior Efficiency.** The material issue being the plaintiff's injury, and not his past record, evidence of his efficiency and fidelity throughout a long term of service does not, as a general proposition, help to fix the amount of damages; but where a case presents a flawless trial record, convincing proof of plaintiff's injuries and an absence of evidence of negligence, such evidence is not improper, as supplemental to the main facts; for, it gives moral effect and evidential force to said other facts and thereby assists in determining the amount of damages which should be awarded for the injuries sustained. *Ib.*
  17. **Unconstitutional Statute: Blanket Ballot Law: Constitutional Majority.** A bill which failed to obtain a majority of all the members elected to either house of the General Assembly, as shown by a count of the recorded vote in the journal of that house, never became a law, although signed by the presiding officer of each and approved by the Governor. *State ex rel. v. Drabelle*, 515.
  18. ———: ———: ———: **Count: Members Voting Aye as Shown by Journal.** The Constitution (Sec. 31, art. 4) says that "no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of members voting for or against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor." Where, therefore, the whole number of members of the House was 142, a constitutional majority being 72, and the journal of the House in which the ayes and noes were recorded shows only 71 ayes for a certain bill, that bill never became a law, although the journal recites it had received a constitutional majority, and had been signed by the presiding officers of the House and Senate and approved by the Governor. All those constitutional requirements are es-



**EVIDENCE—Continued.**

sential prerequisites to the validity of a law, and one is just as essential as another; and since the Constitution says that a majority of the members to each house shall be recorded on the journal as voting in its favor, unless the journal shows that fact the bill never became a law. Nor can recitals found in the journal to the effect that the bill received a constitutional majority be held to either dispute the recorded vote, or to weaken its effect to the extent of introducing doubt or uncertainty which would preclude courts from interfering.

*Held*, by GRAVES, J., dissenting, with whom WOODSON, J., concurs, that as the Constitution provides, in the same article, that no bill shall become a law until the same shall have been signed by the presiding officer, and that before he shall affix his signature he shall suspend all other business, "declare that such bill will now be read, and that, if no objections be made, he will sign the same to the end that it may become a law," and that "if no objection be made" he shall, in the presence of the House, in open session, and before any other business is entertained, affix his signature, "which fact shall be noted on the journal," and also provides that if any member shall object "that any particular clause of this article of the Constitution has been violated in its passage, such objection shall be passed upon by the House, and if sustained, the presiding officer shall withhold his signature," and that when a bill shall have been so signed in both houses, and approved by the Governor, it "shall become a law," a bill which by the journals is shown to have been signed by the presiding officers of both houses without any objection having been made, and approved by the Governor, should be held to be a law, although a count of the ayes and noes as recorded in the journal of one house shows a majority of the members elected thereto did not vote in its favor; that no objection being offered is strong evidence that no objection in fact existed; and that the provision that any "such objection shall be passed upon by the house" means that it is for the legislative body to adjudicate the question of whether a bill has been constitutionally passed, and that the House, having in this case adjudicated that the bill was legally passed, as is shown by its journal record that it received a "constitutional majority," the court cannot go behind such adjudication.

*Held*, also, that a bill properly attested by the presiding officers of the two houses and approved by the Governor, cannot be impeached in a court by a resort to the journal of one of them. That is the positive trend of modern adjudications, and should certainly be the rule in this State in view of our constitutional provision that "such objection shall be passed upon by the house."

*Held*, also, that if the journal impeaches itself, one part showing the bill did pass and another that it did not receive the necessary constitutional majority, the courts cannot interfere, since the rule everywhere accepted is that if doubt exists as to whether a bill received the necessary number of ayes that doubt must be resolved in favor of the due attestation of the presiding officers and the approval of the Governor; and in this case, not only does the journal say that the bill "was passed" and the memoranda indorsed on the bill say that it was "duly passed," and those recitals are impeached by a count of the names of those voting "aye" recorded in the journal, which shows

## EVIDENCE—Continued.

72 "ayes" (a bare constitutional majority), whereas by counting the names only 71 are found to have so voted, but it also shows that one member is recorded as voting both "aye" and "no," and therefore the journal in the most positive way impeaches itself. *Ib.*

19. **Will Contest: Undue Protest of Mental Soundness.** Where the will states testator is "now in unusual strength of body and mind," that "I am now in the fuller enjoyment of all my faculties than for many years past" and that "the added years have not lessened my mental faculties," it earmarks itself with a question of his sanity. *Major v. Kidd*, 607.
20. ———: **Incapacity.** Evidence that testator in 1859, in robust health, both bodily and mentally, was the owner and manager of an exceedingly large farm; that within that year he became mentally unbalanced, and after three physicians had consulted upon his case, he was taken to an asylum for the insane, where he remained for more than a year; that from the day of his return to his death, in 1910, at the age of 93, he attended to none of the business upon that farm, but it was attended to wholly by his wife and brother; testimony of two doctors who had occasion to see and converse with him, and give it as their opinion that he was of unsound mind; testimony of men and women who worked upon the farm, detailing facts which authorize them to express an opinion as lay witnesses and who testify that he was of unsound mind; and testimony of many neighbors, who knew him both before and after he became insane in 1859, and who testify that in their judgment he was of unsound mind during all the years from 1860 to the day of his death, is substantial evidence requiring the issue of his mental capacity to make a will in 1889 and to add a codicil in 1897, to be submitted to the jury. *Ib.*
21. **Assault with Intent to Kill: Self-Defense.** After an altercation between defendant and W in a saloon W left and his hat was thrown after him into the street. When W returned with his brother to get his hat, as he says, defendant and his partner came out of the saloon with pistols, and defendant, after reviling the brothers, shot at W but missed him. W threw a rock that struck defendant, and then ran, whereupon defendant shot him twice in the hip. Defendant, however, testified that W struck him with the rock and shot at him before he fired. *Held*, that the question whether defendant acted in self-defense, or, with malice, assaulted W. with intent to kill him, was for the jury. *State v. Gould*, 694.
22. **Will Contest: Aged Testator: Unequal Distribution: Undue Influence: Testamentary Capacity.** Testator when about 81 years old journeyed from his home at Cole Camp to Marshall, Missouri, where he spent several months with his son Henry. While there, having gone with Henry to a lawyer's office, he made a will by which he devised his real estate, worth about \$15,000, to that son, and gave to his six other children respectively \$100, \$500, \$100, \$200, \$15, and \$1000. He then returned to live until his death with his daughter at Cole Camp. In a contest of the will there was evidence, though it was by no means uncontradicted, that for two years before the will was written the testator had, on account of mental incapacity, ceased to attend to his business; and while the attesting witnesses testified that they considered

**EVIDENCE—Continued.**

him of sound mind, neither of them had had any acquaintance with him prior to the making of the will. *Held*, that the questions of testamentary capacity and undue influence were for the jury. *Schieberl v. Schieberl*, 706.

23. ———: **Subscribing Witness: Evidence of Facts Upon Which He Bases Opinion of Testator's Capacity.** *Semble* that in a will contest a subscribing witness should be permitted to state on what facts his opinion as to the testator's mental capacity is based. *Ib.*

**EXCEPTIONS.**

1. **Appeal: Motion for New Trial: Record Proper.** Where the correct bill of exceptions does not contain plaintiffs' motion for new trial or any call for it, appellate review must be limited to the record proper, and where that is free from error the judgment will be affirmed. [See *Haggerty v. Ruth*, 259 Mo. 221.] *McKee v. Donner*, 378.
2. ———: **No Bill of Exceptions: Record Proper: Sufficiency of Petition.** Although the bill of exceptions was filed too late, and accordingly only the record proper can be considered by the Supreme Court on appeal, still the sufficiency of the petition is a proper subject of inquiry. *Shoe Co. v. Wyble*, 675.

**EXECUTIONS.**

**Tax Sale: At No Term of Court.** The Supreme Court takes judicial notice of the terms of the circuit court, and knows that the terms of said court in Pemiscot county in 1879 began on the "second Monday of March and September," and therefore a tax deed reciting that the land was sold "at the November term, 1879, of said court" is void on its face. *Russ v. Sims*, 27.

**FELLOW-SERVANT.** See *Master and Servant*.

**FORMER ADJUDICATION.** See *Res Adjudicata*.

**FRAUDULENT CONVEYANCES.**

1. **By Married Woman with Husband: Evidence.** Evidence *held* to support a finding that a conveyance of land was valid, having been signed and acknowledged by the grantor, a married woman, without fraud or coercion. *Nelson v. Alport*, 319.
2. **Avoiding Deed from Third Person to Debtor's Wife: Execution Sale: Combination: Inadequate Price: Equity.** Plaintiffs' petition states, that R traded his stock of goods and his note for \$2500, which he afterwards paid, for a hundred acres of land the title to which was taken in his wife; that the conveyance of the land was made in fraud of plaintiffs as creditors of R; that plaintiffs separately sued him in attachment and the writs were levied and the abstracts filed; that R made default and judgments were taken against him, under one of which execution was levied and the land sold for \$3 to L as trustee for plaintiffs, the execution being returned unsatisfied; that afterward R and his wife without consideration conveyed the land to defendant W in fraud of creditors, so that W became trustee for the plaintiffs; and that W in turn gave a purported deed of trust to defendant bank without consideration and likewise

## FRAUDULENT CONVEYANCES—Continued.

in fraud of creditors. The prayer asks that the original conveyance to R's wife, the conveyance to W, and the deed of trust be held fraudulent and void, and asks also for general relief. The decree held the conveyances fraudulent and void as against the sheriff's execution deed to plaintiffs—a conveyance not mentioned in the petition. *Held*, that the inadequacy of the price paid at the execution sale, in connection with the combination which by interposition of the trustee brought it about, rendered the sale feigned and colorable, and amounted to a fraud against R, the debtor, and accordingly the judgment must be reversed and the cause remanded. [Only BROWN, WALKER, and WOODSON, JJ., concur in the opinion in this case; LAMM, C. J., and FARIS, J., concur in the result, while GRAVES and BOND, JJ., dissent.] *Shoe Co. v. Wyble*, 675.

**GIFT TO CHURCH.** See *Charities*.

**HOLIDAYS.**

**Valid Sentence and Judgment.** Judgment and sentence entered on a legal holiday other than Sunday are valid. *State v. Gould*, 694.

**HUSBAND AND WIFE.**

1. **Suit by One Against Other.** The husband may sue the wife either at law or in equity, the same as if she were a *feme sole*; for instance, he may bring suit for the appointment of a receiver to take charge of and administer real estate conveyed to both as an estate by the entirety. *Abramsky v. Abramsky*, 117.
2. **Receiver: Appointment: Estate by the Entirety.** Where lots were conveyed to a husband and wife, thereby creating an estate by the entirety, and a mortgage was placed thereon by them to secure the payment of money borrowed for the construction of a building thereon, and the wife has ousted the husband from all control of the property and has collected and appropriated the rents, and failed and refused to apply any of the rents to the payment of the debt, and proceedings for foreclosure of the mortgage have been begun, the circuit court has power, upon the husband's suit against the wife alone, to compel an accounting, and to appoint a receiver to take charge of the property and rent the same and collect the rents; and if there is nothing in the facts to indicate that the court has abused its sound discretion, a motion to revoke the order appointing the receiver will not be sustained on appeal. *Ib.*
3. **Conveyance: By Married Woman with Husband: Fraud: Evidence.** Evidence *held* to support a finding that a conveyance of land was valid, having been signed and acknowledged by the grantor, a married woman, without fraud or coercion. *Nelson v. Alport*, 319.
4. **Insurance Policy: Wife as Beneficiary: Vested Right: Constitutional Statute.** A wife named as beneficiary in a life insurance policy issued on the life of her husband, upon which he alone paid the premiums, has no such vested rights therein as renders unconstitutional a statute which divests her of all interest therein in the event of her death or divorce before the

## HUSBAND AND WIFE—Continued.

death of the husband; even if spoken of as vested, they are subject to be divested on the condition subsequent. That statute must be read into the policy and become a vitally operative part thereof, as much so as if its very terms were read into it; and it is applicable to all divorced wives and to all insurance policies issued after its enactment. And hence there is nothing in its provisions permitting the husband, who has alone paid all the premiums on a policy issued on his life, to name another beneficiary, in the event of the wife's divorce, that deprives her of her property without due process of law, or denies her the equal protection of the laws, or authorizes an unreasonable seizure of her property, or its taking for a private use, or violates any constitutional provision against special or class legislation. *Orthwein v. Ins. Co.*, 650.

5. ———: **Freedom of Contract:** Freedom to contract as one pleases is not an element of the life insurance business; on the contrary, the right to make insurance contracts is subject to statutory regulation. *Ib.*
6. ———: **Wife as Beneficiary: Change: Divorce for Husband's Fault.** Sec. 6944, R. S. 1909, authorizing the husband to designate another beneficiary in a life insurance policy, issued on his life for the benefit of his wife and paid for by him alone, "in the event of the death or divorcement of the wife before the decease of the husband," entitled him to designate another beneficiary whether he or she was found to be the injured party in the suit for divorce, and whether it was brought by him or her. The right is vouchsafed to the husband without regard as to who was adjudged to be at fault in the divorce proceeding, and the statute violates no vested right of the wife, and is constitutional. *Ib.*
7. ———: ———: ———: ———. The word "divorcement" used in the statute, means "divorce," and does not imply affirmative action by the husband alone. No other significance is to be given it. Even if it be true that in a Biblical sense the word "divorcement" primarily implied affirmative action by the husband, that fact would have no tendency to prove the word was used in a Biblical sense by the General Assembly when inserted in section 6944. *Ib.*

## INDICTMENT AND INFORMATION.

"With a Certain Deadly Weapon." The use of the word "with" before the words "a certain deadly weapon," in an information charging assault with intent to kill, does not vitiate the information. *State v. Gould*, 694.

## INSTRUCTIONS.

1. **Negligence: Putting Belt on Pulley: Crippled Hand of Superintendent: Instruction to Disregard: Limiting Effect: New Trial.** Where the plaintiff was injured by the fact that the superintendent pushed a heavy belt onto a dead pulley while plaintiff's ladder was leaning against the shaft as he was endeavoring to "hand up the slack," without giving warning to plaintiff that the belt was about to begin to "crawl," whereby plaintiff was thrown to the floor, and the petition described the superintendent as "physically incapacitated to do such work," and plaintiff testified that he did not know the

## INSTRUCTIONS—Continued.

superintendent had a crippled hand, and the superintendent denied that its crippled condition interfered with his use of it, and plaintiff's instructions tendered no issue on the condition of that hand, it cannot be held that an instruction for defendant telling the jury that "there is no evidence in the case that the condition of the superintendent's left hand directly caused, or directly contributed to cause, the plaintiff's injuries, and your finding on that issue must be for defendant," merely limited the effect of the evidence, since it was so worded as to entirely destroy its effect. Nor, on the other hand, will it be held, since neither on defendant's nor plaintiff's theory did the crippled hand connect itself in a causal way with the accident, that the giving of the instruction was a sufficient ground for granting plaintiff a new trial. *Strother v. Milling Co.*, 1.

2. ———: ———: **Instruction: Diverting Jury's Minds from Issue.** An instruction should focus the minds of the jury on the real issues of the case, and not divert them therefrom. It should not lug in imaginary defenses unsupported by the evidence. Where plaintiff was assisting the superintendent of a mill to place a heavy belt upon a dead pulley, and both sides agree that it was the duty of the superintendent to give him notice when the belt began to "crawl" onto the pulley, and the vital issue is whether or not such notice was given, an instruction telling the jury that, though they may believe from the evidence that the superintendent "was negligent in the performance of the work in which he and plaintiff were engaged, and such negligence was the direct cause of plaintiff's injuries, yet if you further believe from the evidence that such negligence consisted solely in the superintendent's choice of the method of performing such work," you will find for defendant, is erroneous, since there was no evidence tending to show that "the choice of the method of performing such work" was the only negligence of the master. *Ib.*
3. ———: **Assumption of Risk: No Basis of Fact.** Where the vital question in the case is whether the master gave the notice to the employee which it was his duty to give, and for failure to give which the injury resulted, there is no room in the case for an instruction on assumption of risks. Risks assumed by the servant are those which remain after the master has exercised ordinary care. And in this case it is held that the natural effect of such an instruction was to confuse and mislead the jury. *Ib.*
4. ———: **Due Care: High-Sounding Definition.** It is better that instructions use the words "due care" and then define what such care is, and not tell the jury that plaintiff "was bound to use his senses, intelligence and experience"—words calculated to lead astray the minds of common-sense jurors. *Ib.*
5. ———: **Opportunity of Inspection.** Where there was evidence that the work of replacing the transformer with a new one, on the decayed cross-arm, was a "rush job" and that the lineman was not furnished with tools for inspecting the cross-arm, it was not error for the instruction to include, as an element of his right to recover for injuries caused by the breaking of the cross-arm, that he "did not have the opportunity, time and means to discover the condition of the cross-arm." *Rutledge v. Swinney*, 128.

## INSTRUCTIONS—Continued.

6. **Instruction for Defendant: No Evidence.** It is not error to refuse an instruction for defendant if there is no sufficient evidence upon which to base it. If the evidence does not tend to establish a custom among the defendant's linemen of inspecting cross-arms before they went upon them, it is not error to refuse an instruction basing a defense upon such custom. *Rutledge v. Swinney*, 128.
7. ———: ———: **Refused Covered by Those Given.** It is harmless error to refuse an instruction for defendant whose theory of defense is covered by others given. Even though it be conceded there was slight evidence to support an instruction telling the jury that if it was the duty, under the system of employment adopted by defendant, for each lineman to inspect cross-arms before going upon them, any error in refusing that instruction was cured by another given telling the jury that even though linemen frequently placed their weight upon cross-arms, it was plaintiff's duty, before placing his weight upon the cross-arm in question, to exercise ordinary care to ascertain whether it was adequate to bear his weight, and if he failed to exercise such care he could not recover. *Ib.*
8. **Larceny: "Feloniously."** Where in a prosecution for grand larceny the court instructed the jury to find the accused guilty if they believed from the evidence that he wrongfully took and carried away a pocketbook and money from the possession of M., with the intent to fraudulently convert it to his own use and permanently deprive the owner thereof without his consent, the same being the property of M., the failure to require a finding that accused's intent in taking and carrying away the things stolen was felonious did not render the instruction erroneous. *State v. Ward*, 149.
9. ———: **"Without Claim of Right."** Where the State's evidence tended to show that the accused picked the pocket of the prosecuting witness like an expert, that he was described to the police by his victim and was taken within an hour and a half with part of the money on him, and where he made no defense at the trial, a failure to require a finding that the taking was without claim of right would not be error, since the facts show there was no such claim. *Ib.*
10. ———: **Evidence: Identity of Stolen Bank Notes.** Evidence as to the identity of national bank notes found on the accused with those stolen from the prosecuting witness *held* sufficient to take the question to the jury. *Ib.*
11. ———: **All the Law of the Case: Motion for New Trial: Appeal: Circumstantial Evidence.** Although the trial court's attention was at no time specifically called to a failure to instruct on circumstantial evidence, and the motion for new trial merely alleged that the court did not instruct on all the law of the case, still the Supreme Court is bound to see that no injustice is done by such omission, and it is *held*, in a trial for grand larceny, where direct evidence identifies the accused as the person who pressed against the prosecuting witness when his pocketbook was taken, and identifies money found on the accused as part of that then stolen, that an instruction on circumstantial evidence was not required. *Ib.*
12. **Murder: Statement of Coindictee: Failure to Instruct: Collateral Matter.** Where two defendants are jointly indicted and

## INSTRUCTIONS—Continued.

tried for the same murder, it is not error for the trial court to instruct the jury in behalf of appellant that any statement made by his coindictor is not binding upon appellant, (1) if there is no evidence of any statement having been made by said coindictor which tends to connect appellant with their joint case, or (2), even if there is such testimony, unless appellant requests such an instruction, since the matter is a collateral one and is not strictly within the purview of section 5231, Revised Statutes 1909. *State v. Taylor*, 210.

13. ———: **Wrong Date of Deceased's Death.** Where deceased was found dead on August 8, 1910, and defendants were tried in December, 1912, an instruction telling the jury that if they find and believe that "at any time prior to the filing of the indictment" defendants did strike and beat deceased with a heavy iron bar, "and that within a year and a day thereafter, to-wit, on the — day of August, 1912, he died from the effects of such striking and beating," they should find the defendants guilty, contains only a clerical mistake in stating the date of deceased's death as "on the — day of August, 1912," which is without substance, since the jury are expressly required to find that deceased died within a year and a day after he was assaulted, which cures the palpable clerical error of 1912, and besides, since it is a murder case, it is wholly unimportant when the prosecution was begun, if deceased died within a year and a day after he was assaulted. *Ib.*
14. ———: **Defendant's Failure to Testify: Refusal of Instruction Not to Consider.** It is not reversible error to refuse an instruction asked by defendant to the effect that the jury are not to consider as any evidence of his guilt or innocence the failure of defendant to testify in his own behalf. [Following *State v. Robinson*, 117 Mo. 649.] Neither is it error for the trial court to give such an instruction. [Citing *State v. DeWitt*, 186 Mo. 61.] And it would perhaps be a little fairer to defendant to give such an instruction, if he asks it; but in view of the dark and muddy language of Sec. 5243, R. S. 1909, and the holding in the *Robinson* case, it cannot be held to be reversible error not to give it. *Ib.*
15. **Negligence: Street Railways: Applicable to Issues: Going Into Danger.** Where the allegation of negligence in the petition, especially when given the liberal construction to which it is entitled after verdict, is wide enough to embrace the meaning that plaintiff was moving toward the fixed path of defendant's cable car under such circumstances as would cause him to be struck if the gripman did not do certain things about the operation of the car, or give warning of its approach, an instruction which used, as regards the plaintiff's acts, the phrase "going into" a situation of danger, as well as the phrase "in such situation," does not enlarge the issues framed by the petition, and, furthermore, defendant should not be heard to complain in that regard on appeal, after having adopted practically the same theory in one of its own instructions. *Holzemer v. Railroad*, 379.
16. ———: ———: **Going Into Danger: Duty of Gripman.** Where the evidence shows that plaintiff, at a street crossing, started southeastwardly across the parallel tracks of defendant's cable railway, and thus unwittingly turned his back somewhat toward an eastbound car which struck him



## INSTRUCTIONS—Continued.

after he had crossed the north track, on which a westbound car also was approaching, and from the time he started to cross the tracks the gripman by the use of ordinary care could have seen him, it cannot be said that an instruction that it was the gripman's duty to act when he saw or could have seen the plaintiff going into a situation of danger was erroneous because not supported by the evidence. *Holzemer v. Railroad*, 379.

17. ———: ———: ———: **Duty of Gripman: Presumptions.** Where plaintiff, in plain view (whether seen or not) of the gripman on defendant's eastbound cable car, and unaware of its approach, started to walk diagonally across the tracks at a street crossing while a westbound car also was drawing near, and did in fact cross the north track and get well upon the south track before he was struck and injured by the eastbound car, an instruction was rightly refused which told the jury that even though the gripman saw the plaintiff approaching the track, yet under the law he had the right to assume that plaintiff would stop before he went upon the track, and that the gripman was not required to check or stop the car until there was danger of a collision. *Ib.*
18. **Refused: Points Already Covered.** The refusal of instructions requested on points covered by instructions already given is not error. *Ib.*
19. **Trains: Meaning of Orders.** The words "orders" and "rules" as applied to the movement of trains are synonymous, and there is no difference in their practical application. An instruction telling the jury that "the orders to the engineer and signals displayed authorized him," etc., is justified by the evidence, if the rules of the company, or their substituted custom, familiar to every operative, authorized the instruction, for such rules and custom had the practical force and effect of an order. *Finnegan v. Railroad*, 481.
20. **Will Contest: Capacity: Ordinary Affairs: Capacity and Necessity of Heirs.** An instruction telling the jury that if testator did not have sufficient soundness of mind "to understand the ordinary affairs of life" he was incapacitated to make a will, is not erroneous. *Held*, by BROWN, J., that said instruction in requiring testator to understand the "capacity and necessity" of those who are the natural objects of his bounty, is erroneous, but as that part of the instruction is not relied upon by appellants it is not ground in this case for reversal. *Major v. Kidd*, 607.
21. ———: ———: **Adjudged Insane.** An instruction telling the jury "that under the law as it existed in 1859 and 1860, it was not required that a person be adjudged insane by any court or tribunal in order that he be placed in the insane asylum, but might be sent as a private patient upon the certificate of two physicians," even if technically erroneous, was harmless in this case, the facts being that testator was taken to an insane asylum in 1859 and remained there for over a year, and made his will in 1889, and the evidence of his incapacity being satisfactory. *Ib.*
22. **Date of Crime: Information and Proof.** Where the jury heard the information read, charging that the offense occurred De-

## INSTRUCTIONS—Continued.

ember 19, 1912, and the evidence on both sides showed its occurrence on that date (a time within three years of the filing of the information), an instruction was not erroneous which laid the crime as within three years next before the filing of the information but gave no date. *State v. Gould*, 694.

23. **Assault with Intent to Kill: Malice: Verdict.** Where the information charged defendant with assault with intent to kill, with malice, and the jury found him guilty as charged, an instruction which told the jury that if they found the facts as stated therein they should find defendant guilty of assault with intent to kill, erred, if at all, in favor of defendant in not requiring the jury to specify in their verdict that the assault was made with malice. *Ib.*
24. **Will Contest: Incapacity: Aged Testator.** An instruction in a will contest which told the jury that if they found the provisions of the will to be grossly unequal and discriminatory, then such inequality and discrimination, if not explained or accounted for, might be considered as tending to show want of capacity to make a valid will, but for that purpose only, was reversible error in that it failed to include other circumstances tending to show mental incapacity. Gross inequality in the distribution of an estate is a circumstance which, when coupled with other circumstances, may tend to show mental incapacity, but standing alone it has no such tendency. [*WOODSON and GRAVES, JJ.*, dissent on the ground that the evidence so conclusively showed mental incapacity that the proponent was not harmed by the instruction.] *Schieberl v. Schieberl*, 706.
25. ———: ———: **Old Age and Infirmary as Evidence of Mental Incapacity.** In a will contest an instruction which told the jury that old age, sickness, bodily disease, and infirmities alone furnished no evidence of mental incapacity, and that unless they found testator's mind to have been so unsound that he could not understand the act he was performing, the property he possessed, the disposition he was making of it, and the objects of his bounty, they could not find against the will on the ground of mental incapacity, was rightly refused. Evidence of old age, sickness, bodily disease, and infirmities are all matters to be considered by the jury in determining mental capacity. *Ib.*

## INSURANCE.

1. **Policy: Wife as Beneficiary: Vested Right: Constitutional Statute.** A wife named as beneficiary in a life insurance policy issued on the life of her husband, upon which he alone paid the premiums, has no such vested rights therein as renders unconstitutional a statute which divests her of all interest therein in the event of her death or divorce before the death of the husband; even if spoken of as vested, they are subject to be divested on the condition subsequent. That statute must be read into the policy and become a vitally operative part thereof, as much so as if its very terms were read into it; and it is applicable to all divorced wives and to all insurance policies issued after its enactment. And hence there is nothing in its provisions permitting the husband, who has alone paid all the premiums on a policy issued on his life, to name

**INSURANCE—Continued.**

another beneficiary, in the event of the wife's divorce, that deprives her of her property without due process of law, or denies her the equal protection of the laws, or authorizes an unreasonable seizure of her property, or its taking for a private use, or violates any constitutional provision against special or class legislation. *Orthwein v. Insurance Co.*, 650.

2. ———: **Freedom of Contract.** Freedom to contract as one pleases is not an element of the insurance business; on the contrary, the right to make insurance contracts is subject to statutory regulation. *Ib.*
3. ———: **Wife as Beneficiary: Change: Divorce for Husband's Fault.** Sec. 6944, R. S. 1909, authorizing the husband to designate another beneficiary in a life insurance policy, issued on his life for the benefit of his wife and paid for by him alone, "in the event of the death or divorce of the wife before the decease of the husband," entitled him to designate another beneficiary whether he or she was found to be the injured party in the suit for divorce, and whether it was brought by him or her. The right is vouchsafed to the husband without regard as to who was adjudged to be at fault in the divorce proceeding, and the statute violates no vested right of the wife, and is constitutional. *Ib.*
4. ———: ———: ———: ———. The word "divorcement" used in the statute, means "divorce," and does not imply affirmative action by the husband alone. No other significance is to be given it. Even if it be true that in a Biblical sense the word "divorcement" primarily implied affirmative action by the husband, that fact would have no tendency to prove the word was used in a Biblical sense by the General Assembly when inserted in section 6944. *Ib.*

**INTOXICATING LIQUORS.**

1. **Sale: Interpretation of Statutes.** Laws relating to the sale of intoxicating liquors ought to be so construed as to carry out the true purpose of their enactment, and in accomplishing this purpose they should be liberally construed. While the statute should not be enlarged, it should be interpreted, where its language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained. *State ex inf. v. Athletic Club*, 576.
2. **Sale: Necessary Elements.** The sale of personal property is a transfer of the absolute or general property in the thing for a price in money. To constitute a valid sale there must be a concurrence of certain essential elements: First, parties capable of contracting, a seller and a buyer, either of whom may be an artificial person having a legal existence or a natural person, and, although such natural person may buy from said artificial person and be enabled to so buy only because he is a member thereof, yet he is still a natural person, because he has no such individualized ownership in the concrete property of the corporation as will enable him to legally appropriate it except by purchase; second, mutual consent, that is, a power and a purpose to sell by the seller, and a willingness to buy on the part of the purchaser; third, a thing being sold, the absolute or general property in which is capable of being transferred and is transferred from the seller to the buyer; and, fourth, a price paid or promised for such thing. *Ib.*

## INTOXICATING LIQUORS—Continued.

3. ———: **By Club to Members.** The supply of intoxicating liquors by an incorporated club to its members, within the club building, for a definite price to be paid, is a sale of such liquors, although the club does not sell to any one except members, and does not permit them to pay for same at the time they are ordered or used, but requires the members to sign cards at the time the liquors are received, acknowledging the receipt and stating the price, and to pay for same at the end of the month when all supplies are paid for, and the money is commingled with other funds of the club and used in replenishing its stock of liquors and purchasing other supplies for the use of members. Nor is such transaction rendered any the less a sale by the fact that the liquor is supplied only to members of the corporation, since the corporation or club is one person, and no member or stockholder has any such individualized interest therein as authorizes him to appropriate any part of its assets without paying for them. *Ib.*
4. ———: ———: **Corporation.** An incorporated social club is a person within the meaning of the corporation laws, and the dispensing of liquors by it to its members for agreed sums of money, although not for profit, is a sale. [To that extent overruling *Bell v. St. Louis Club*, 125 Mo. 308.] *Ib.*
5. ———: ———: **No License: Statute.** In view of the statute (Sec. 7188, R. S. 1909) declaring that "no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop-keeper," it is unlawful for an incorporated social or athletic club, without first obtaining a license as a dramshop-keeper, to dispense liquors to its members at a price paid or to be paid, whether for profit or otherwise. *Ib.*
6. ———: **Corporation: Implied Powers.** Legislative grants of powers to corporations only include such rights and powers as are clearly comprehended within the words of the act creating them or as may be derived therefrom by necessary implication, regard being had to the objects of the grant, and if ambiguities or doubts arise out of the terms used in the statute they must be resolved in favor of the public; and even though it be admitted (which would seem to be judicial legislation) that social clubs may be incorporated under the statutes providing for the incorporation of benevolent, religious, scientific, educational and miscellaneous associations, those statutes cannot be held to imply that an incorporated social club can sell liquors to its members, because the sale of intoxicating liquor is a limited privilege, and an express statute says that "no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop-keeper," and that such a license can be granted only to "a law-abiding, assessed tax-paying male citizen over twenty-one years of age," and, hence, such a license cannot be granted to a corporation, since it lacks three of the essential elements, namely, age, character and sex, and hence the doctrine of implied powers is wholly inapplicable to this class of corporations when the question arises as to their right to sell such liquors. *Ib.*
7. ———: ———: ———: **Former Construction of Statute.** A judicial construction of the statutes by the highest court of

**INTOXICATING LIQUORS—Continued.**

the State to the effect that a corporation possessed certain implied powers becomes a part of such statutes only in case such construction affects contract or property rights. The right to sell intoxicating liquor is a mere privilege or governmental grant, and does not involve either contract or property rights, hence, the former holding of the Supreme Court, in *Bell v. St. Louis Club*, 125 Mo. 308, that the dispensing of liquor at retail by a social club to its members was not a violation of the dramshop law, cannot be held to have conferred on said club a vested right to continue such sale. *Ib.*

8. ———: ———: ———: **Legislative inaction.** Long legislative inaction after a court has placed an interpretation on a criminal statute favorable to defendant does not estop the State from enforcing it, nor can it be allowed to defeat its manifest purpose. *Ib.*

**JEOPARDY.**

**Jury Sworn Before Arraignment.** Defendant in a criminal case was not twice put in jeopardy where, after the jury had been sworn, it was discovered there had been no arraignment, and after he had then been arraigned and refused to plead the trial proceeded to his conviction. *State v. Gould*, 694.

**JOURNAL OF HOUSE.** See **Legislation.**

**JUDGMENTS.**

1. **Tax Suit: After Sale by Owner.** A judgment for taxes against the original equitable owner of swamp land and a sale thereunder, begun and made long after he had by recorded deed conveyed the land to another, conveyed no title to the purchaser at the tax sale. *Russ v. Sims*, 27.
2. **Tax Sale: Unknown Heirs.** The petition in a tax sale must describe the interests of the unknown heirs of a deceased owner, otherwise a sale under a judgment rendered thereon is void. After the death of the owner of the land, his heirs must be properly sued, served and allowed their day in court, else their title is not affected by judgment. *Chilton v. Nickey*, 232.
3. **Suit to Quiet Title: Ownership in Others than Parties.** Where the evidence in a suit to quiet title shows that a portion of the land in suit did not, when the suit was instituted, belong either to plaintiff or to defendant, there can be no adjudication as to that portion. *Ib.*
4. **Holidays: Valid Sentence and Judgment.** Judgment and sentence entered on a legal holiday other than Sunday are valid. *State v. Gould*, 694.

**JUDICIAL NOTICE.**

**Tax Sale: At No Term of Court.** The Supreme Court takes judicial notice of the terms of the circuit court, and knows that the terms of said court in Pemiscot county in 1879 began on the "second Monday of March and September," and therefore a tax deed reciting that the land was sold "at the November term, 1879, of said court" is void on its face. *Russ v. Sims*, 27.

## JURIES AND JURORS.

**Voir Dire: Attorney for Casualty Company: Not Record Party.**

Where an attorney for a casualty company was in court ostensibly as counsel for the defendant, and making a defense which was really in behalf of his company, not a record party to the suit, it was not improper for plaintiff's counsel to ask jurors on their *voir dire* if they were connected in a business way with the casualty company. *Kinney v. Railroad*, 97.

## LACHES.

1. **Deed of Trust: Sale of Redemption: One Year and Eleven Months.** Where the cotenant in possession offered to pay off the note secured by a deed of trust on the property, and the legal holder (the defendant) refused to indorse the note to him unless it was to be marked paid, and for that reason the tender was not continued, and about four weeks after the sale to said mortgagee that cotenant surrendered peaceable possession to him, and he proceeded to construct buildings thereon worth three times the value of the property at the time of the sale, and the said mortgagors delayed for one year and eleven months after the sale was made before bringing suit to set the sale aside, and gave him no notice that they claimed the sale was unfair and though aware of the improvements being erected made no objection thereto and asserted no claim to the property, their delay in instituting their suit bars their right to recover. *Roby v. Smith*, 192.
2. ———: ———: ———: **Inadequacy of Price.** Inadequacy of price is not alone a sufficient ground for setting aside a sale under a deed of trust; and though the property sold for one-fourth its value, and though one of the mortgagors offered to pay the mortgage note before the sale, but the tender was refused because he was not willing to have the note marked paid but wished to have it indorsed to him, yet if the preponderance of the evidence is to the effect that the sale was fairly conducted, and after it was made the property was peaceably surrendered to the mortgagee as purchaser, and he proceeded to make valuable improvements thereon, and the mortgagors, though aware of such facts, made no claim to said property or objections to said improvements, the sale will not be set aside at their suit instituted one year and eleven months after said sale. *Ib.*
3. **Not Defense to Claim Under Legal Title.** The doctrine of laches is only applied to defeat a claim for some equitable relief. It is no bar to a claim made under a legal title. *Chilton v. Nickey*, 232.

## LANDS AND LAND TITLES.

1. **Swamp Lands: History of Acts.** The various acts of Congress and of the General Assembly concerning swamp lands, and especially those affecting titles to such lands in the ten counties in southeast Missouri, and more especially in the counties of Cape Girardeau, Dunklin, Mississippi, New Madrid and Pemiscot, are traced step by step in the opinion; and as incident thereto the wandering habitat of the "Register's Book" and the "Receiver's Book" in Pemiscot county and the development of Carleton's Abstracts are explained—except that this history does not include the acts permitting Pemiscot, Dunklin and other southeastern counties to donate swamp

## LANDS AND LAND TITLES—Continued.

lands to railroad, toll road, plank road and other corporations. *Russ v. Sims*, 27.

2. ———: **Title Passed to State: Delay in Patents.** The Act of Congress of September 28, 1850, was a grant to the State of Missouri of the unsold swamp lands lying within its boundaries, and any delay in the issuance of patents to the State or the selection of the swamp lands falling within the designations, did not defeat or impair the title of either the State or its grantees. *Ib.*
3. ———: **Delay in Patents: Consequent Confusion.** In many cases neither the State nor the county had patents to swamp lands in the ten counties of southeast Missouri prior to 1870, although for fifteen years prior thereto such lands were being sold by the counties under authority of statutes, the money paid, triplicate receipts issued by the designated county officers, and entry of such sale and the name of the entryman made in the Receiver's Book; and hence it was that title depended upon those receipts and books, and when the receipts were lost, or the county courthouse burned, wherein such books and duplicates of such receipts were, by statutes pertaining to the counties of Cape Girardeau, Dunklin, Mississippi, New Madrid and Pemiscot, required to be kept, great confusion in titles to many tracts resulted, since, after they were sold and paid for and no patents were issued, the county subsequently sold them a second time. *Ib.*
4. ———: **Equitable Title: No Patent.** A purchaser of swamp land who complied with all the requirements of the law relating to the sale of such land (paid the purchase price and received regular receipts of the receiver and register), acquired the equitable title, although, through some fault of the State or county, he received no patent therefor. *Ib.*
5. ———: ———: **Notice.** The Register's Book and Receiver's Book, showing that certain swamp land has been entered and paid for by a certain entryman, if kept in the manner required by the various statutes relating to such lands, are notice to the world that the county has sold the land; and a subsequent purchaser from the county purchases subject to the rights of such former purchaser and his grantees. *Ib.*
6. ———: ———: ———: **Common Source.** In a suit to quiet title, where all parties claim under a common source, it is of no consequence whether such common source was the owner of the legal or of a mere equitable title. *Ib.*
7. ———: **Evidence: Carleton's Abstracts: Original.** If Carleton's Abstract of swamp lands in Pemiscot county is admissible as evidence of title under either act of the Legislature pertaining thereto (Laws 1901, p. 251, or Laws 1907, p. 271), then the original Receiver's Book and Register's Book from which they were made, though for some years not in the courthouse or the possession of the county clerk, are also admissible. *Ib.*
8. ———: **Tax Suit: After Sale by Owner.** A judgment for taxes against the original equitable owner of swamp land and a sale thereunder, begun and made long after he had by recorded deed conveyed the land to another, conveyed no title to the purchaser at the tax sale. *Ib.*

## LANDS AND LAND TITLES—Continued.

9. ———: **Tax Sale: At No Term of Court.** The Supreme Court takes judicial notice of the terms of the circuit court, and knows that the terms of said court in Pemiscot county in 1879 began on the "second Monday of March and September," and therefore a tax deed reciting that the land was sold "at the November term, 1879, of said court" is void on its face. *Ib.*
10. ———: **Limitations: Estoppel.** Where the evidence shows the lands were wild swamp land, covered with timber, uncultivated and in the possession of no one, neither the defense of limitations nor of estoppel is available. *Ib.*
11. **Partition: During Life Estate: Contrary to Will.** Where the will gave land to testator's son and his wife "during their natural lives and at the death of both to be divided equally between all my grandchildren; but should my son die before his wife the real estate is to be divided equally between my grandchildren and said daughter-in-law, share and share alike," the land cannot be partitioned during the lifetime of said son, even on his petition, the word "divided" indicating clearly that it was the testator's will that no sale or other disposition of the property be made during the life of the son. [Refusing to follow *Reinders v. Koppelman*, 68 Mo. 482; *Sikemeier v. Galvin*, 124 Mo. 367; and *Preston v. Brant*, 96 Mo. 552; and following the more recent cases of *Gullick v. Huntley*, 144 Mo. 1 c. 246, and *Stewart v. Jones*, 219 Mo. 614.] *Hill v. Hill*, 55.
12. ———: **Divide: Definition.** The word "divide," when given its ordinary and usual significance, means to partition into severalty. *Ib.*
13. ———: **Construing Will: Meaning of Terms.** In construing a will, courts derive but little assistance, in determining the meaning to be given the various terms and expressions used therein, from adjudicated cases. No two wills are precisely alike, and the conditions which surround testators differ so widely that conclusions reached in one case are rarely of great service as a guide in another. *Ib.*
14. **Common Source of Title: Possession Under Erroneous Description.** It is not necessary, to constitute a common source of title, that both parties should have a good title from the common source. That would be impossible. All that is necessary is that both parties claim under the common source. So where one of defendant's predecessors in title took possession of a right of way under a deed from the owner of the land under whom plaintiff claims, which deed misdescribed one of the lots over which the grant was made, that makes a common source of title which cannot be impeached by defendant except by showing a title superior to that of the common source. *Stone v. Railroad*, 61.
15. **Quieting Title: Evidence: Deed: Made by Order of Court.** In a suit to quiet title a joint deed to the property in dispute made by the owner's assignee in bankruptcy and by a substituted trustee under a deed of trust, was properly admitted in evidence, over an objection that the power of the makers was not shown, where the deed recites that the land was sold under an order of the court in bankruptcy and under the provisions of the deed of trust. *Ib.*



## LANDS AND LAND TITLES—Continued.

16. **Deed of Trust: -Substitute Trustee: Sheriff: Ex parte Appointment.** The fact that the court's appointment of the sheriff as substituted trustee to sell land was made on an *ex parte* application of the beneficiary in the deed of trust, does not render the appointment invalid. *Ib.*
17. **Vendor and Purchaser: Real Estate: In Possession of Third Party.** He who buys property in the open and visible possession of a third person is chargeable with notice of the title and right of that person in the premises. *Ib.*
18. **——: Foreclosure Deed not Recorded: Purchase of Equity of Redemption.** A recorded deed of trust is constructive notice that the legal title is outstanding in the trustee, and one who, without notice of the foreclosure of the deed of trust, purchases the equity of redemption ten years after the foreclosure but before the recording of the foreclosure deed, is not entitled, in a suit to quiet title, to have the foreclosure deed declared void, although meanwhile he has completed and operated a railroad upon the land in question. *Ib.*
19. **——: Adverse Possession: Evidence.** Evidence *held* insufficient to establish title in defendant by adverse possession. *Ib.*
20. **Husband and Wife: Suit by One Against Other.** The husband may sue the wife either at law or in equity, the same as if she were a *feme sole*; for instance, he may bring suit for the appointment of a receiver to take charge of and administer real estate conveyed to both as an estate by the entirety. *Abramsky v. Abramsky*, 117.
21. **——: Receiver: Appointment: Estate by the Entirety.** Where lots were conveyed to a husband and wife, thereby creating an estate by the entirety, and a mortgage was placed thereon by them to secure the payment of money borrowed for the construction of a building thereon, and the wife has ousted the husband from all control of the property and has collected and appropriated the rents, and failed and refused to apply any of the rents to the payment of the debt, and proceedings for foreclosure of the mortgage have been begun, the circuit court has power, upon the husband's suit against the wife alone, to compel an accounting, and to appoint a receiver to take charge of the property and rent the same and collect the rents; and if there is nothing in the facts to indicate that the court has abused its sound discretion, a motion to revoke the order appointing the receiver will not be sustained on appeal. *Ib.*
22. **Specific Performance: Parol Evidence: Statute of Frauds.** Specific performance is refused where there is no description, in letters and memoranda, to satisfy the Statute of Frauds, other than "land south of the Missouri Pacific Railroad tracks," and "forty-some-odd acres of bottom land you have adjoining us [plaintiff] at Sherman, Missouri." Parol evidence, when admitted to disclose the situation of the parties when the writings were made shows only that defendant did own land adjoining a tract of plaintiff's, but not necessarily situated at Sherman, and, even though the evidence had shown such location, it appears that defendant's tract contained 72.95 acres, and it would be impossible to ascertain from the memorandum what portion should be taken to compose the forty-odd acres mentioned. *Cement Co. v. Kreiss*, 160.

## LANDS AND LAND TITLES—Continued.

23. **Deed of Trust: Sale: Redemption: Laches: One Year and Eleven Months.** Where the cotenant in possession offered to pay off the note secured by a deed of trust on the property, and the legal holder (the defendant) refused to indorse the note to him unless it was to be marked paid, and for that reason the tender was not continued, and about four weeks after the sale to said mortgagee that cotenant surrendered peaceable possession to him, and he proceeded to construct buildings thereon worth three times the value of the property at the time of the sale, and the said mortgagors delayed for one year and eleven months after the sale was made before bringing suit to set the sale aside, and gave him no notice that they claimed the sale was unfair and though aware of the improvements being erected made no objection thereto and asserted no claim to the property, their delay in instituting their suit bars their right to recover. *Roby v. Smith*, 192.
24. ———: ———: ———: **Inadequacy of Price.** Inadequacy of price is not alone a sufficient ground for setting aside a sale under a deed of trust; and though the property sold for one-fourth its value, and though one of the mortgagors offered to pay the mortgage note before the sale, but the tender was refused because he was not willing to have the note marked paid but wished to have it indorsed to him, yet if the preponderance of the evidence is to the effect that the sale was fairly conducted, and after it was made the property was peaceably surrendered to the mortgagee as purchaser, and he proceeded to make valuable improvements thereon, and the mortgagors, though aware of such facts, made no claim to said property or objections to said improvements, the sale will not be set aside at their suit instituted one year and eleven months after said sale. *Ib.*
25. **Deed: Delivery: To Third Person for Record: Voluntary Family Settlement.** A mother, by way of voluntary family settlement, made separate deeds to her two children and to her grandchildren, covering in the aggregate all of her real estate. She delivered the three deeds to her son Fred with instructions to record them. He recorded his own, and that of his brother was afterward recorded, but that to the grandchildren he returned to the grantor, in whose trunk it was found at her death ten years later. *Held*, a good delivery of the deed to the grandchildren, and, this being a case of family settlement, and the grandchildren having been minors at the time of the delivery, their acceptance is presumed, and the title passed to them. *Fenton v. Fenton*, 202.
26. **Evidence: Patents to Land: Certification of Copies.** Copies of land patents certified by the Recorder of the General Land Office at Washington, are receivable in evidence. *Chilton v. Nickey*, 232.
27. **Tax Sale: Unknown Heirs.** The petition in a tax sale must describe the interests of the unknown heirs of a deceased owner, otherwise a sale under a judgment rendered thereon is void. After the death of the owner of the land, his heirs must be properly sued, served and allowed their day in court, else their title is not affected by judgment. *Ib.*
28. **Suit to Quiet Title: Legal Title: Adverse Possession: Issue of Law: Verdict.** Where in a suit to quiet title the plain-

## LANDS AND LAND TITLES—Continued.

- tiff stood on his legal title and the defendant claimed under the thirty-year Statute of Limitations, a square issue of law resulted, and the verdict of the trial court on that issue is conclusive. *Ib.*
29. ———: ———: ———: Preponderance of the Evidence. One claiming under the thirty-year Statute of Limitations must establish his possession by a preponderance of the evidence. *Ib.*
30. Laches Not Defense to Claim Under Legal Title. The doctrine of laches is only applied to defeat a claim for some equitable relief. It is no bar to a claim made under a legal title. *Ib.*
31. Suit to Quiet Title: Ownership in Others than Parties. Where the evidence in a suit to quiet title shows that a portion of the land in suit did not, when the suit was instituted, belong either to plaintiff or to defendant, there can be no adjudication as to that portion. *Ib.*
32. ———: Taxes: Not Pledged: Judgment. Where defendant's answer made no claim for taxes paid on land bought at an invalid tax sale, but a certain sum was put in evidence, the Supreme Court will render judgment, in a suit to quiet title which went against defendant, for an amount proportionate to the sum paid by defendant upon that part of the land adjudged to belong to the plaintiff. *Ib.*
33. Specific Performance: Sale by Heirs: One Heir Willing to Sell. Evidence showing merely that one of several heirs was conducting negotiations looking to a sale of land held in common, and was willing that it should be sold if the others agreed, does not warrant a decree of specific performance for his share. *Barthel v. Engle*, 307.
34. Limitations: Thirty-one Year Statute: Lawful Possession: Color of Title. It is not reasonable to presume that defendant, who interposed the thirty-one year Statute of Limitations, held possession in good faith under a deed to her deviser concerning which the evidence does not show she had knowledge; and the trial court's finding that said defendant gained lawful possession from such deed was accordingly erroneous. *Abeles v. Pillman*, 359.
35. ———: ———: ———: ———: Ownership. The term "lawful possession" used in the thirty-one year Statute of Limitations (R. S. 1909, sec. 1884) does not mean possession based upon ownership of the title to the land—this for the reason that the statute contemplates that the "lawful possession" shall continue for a year after the thirty-year period before the one so having lawful possession becomes ipso facto vested with the title of the claimant. It therefore follows that the person in lawful possession must be some one other than the owner. *Ib.*
36. ———: ———: ———: What is. Color of title is not necessary to establish "lawful possession" under the thirty-one year Statute of Limitations. *Ib.*
37. ———: ———: ———: Special Findings: New Trial. Where in ejectment the defendant asserted title to land under the thirty-one year Statute of Limitations, and the court found

## LANDS AND LAND TITLES—Continued.

specially that, since he had color of title, said defendant was in "lawful possession," but it appears upon appeal that the evidence does not support the finding of color of title, the case is reversed and remanded for a new trial, in the course of which evidence may be introduced upon the question whether or not defendant's possession was of such character as to be lawful, under the statute, without color of title. *Ib.*

38. ———: ———: ———: **No Assessment of Taxes: Nonresident Owner.** Where a defendant in ejectment asserts title to the land under the thirty-one year Statute of Limitations (R. S. 1909, sec. 1884), one requirement of which is that neither the plaintiff nor those under whom he claims shall have paid any taxes on the land for thirty years, the plaintiff will not be excused, no taxes having been paid, by a showing that the record owner was not a resident of the State and that the land was never assessed for taxes, said owner having testified that he had made no inquiry about the land and thought it worthless. *Ib.*
39. **Real Estate: Law of Situs: Trustee Substituted by Foreign Court.** A resident of the State of Maryland devised lands in Missouri to trustees for sale and conversion. On the surviving trustee's *ex parte* application to a court of Maryland he was relieved and another citizen of that State was appointed to and assumed the trust. This last trustee, who was also sole administrator of the testator's estate c. t. a., deeded the lands to one under whom defendants claim. *Held*, that the trustee's deed was ineffectual to transfer the title, only the courts of the *situs* having jurisdiction to deal directly with real property. *De Lashmutt v. Teetor*, 412.
40. **Conversion: For Purposes of Distribution: Failure of Trust on Final Distribution.** In 1878 a testator in Maryland devised land in Missouri to A, B, and C, three of his executors, in trust that they or their survivors should sell it in whole or in part, at public or private sale, upon such terms and at such time as they might deem most advantageous for the estate, and pay the proceeds to the executors to be distributed according to the provisions of the will. One-sixth of his estate the testator gave in trust for a daughter during her life, to be conveyed to the daughter's children at her death. The sole surviving trustee was relieved by a Maryland court in 1887, the Missouri land being still unsold, and a trustee was appointed whose attempted conveyance to defendant's grantor failed to pass the title. *Held*, that the power of the trustees appointed by the will was limited to conversion for distribution according to the provisions of the will; and that upon final distribution of the estate, their power over lands still unsold ceased, and the legal title to one-sixth thereof vested in the trustee for the testator's daughter, and after the death of the daughter became vested in her children. *Ib.*
41. **Estoppel: Trustee for Life Tenant: Cannot Bind Remaindermen.** A trustee for a life tenant has no more power to bind the remaindermen or their title than the life tenant would have had had there been no trust. Such trustee could not dispose of the remainder by estoppel, or by the ratification of a void deed, any more than she could do it by her own deed. *Ib.*
42. ———: ———: ———: **Receiving Proceeds of Invalid Sale: Knowledge.** Remaindermen entitled to a fee in certain prop-

## LANDS AND LAND TITLES—Continued.

erty discharged from a trust under the will of their grandfather, are not estopped to object to an invalid sale of the land by a substituted trustee because they accepted a partial distribution of the estate, made up in part of the proceeds of such sale, they having had no knowledge of the sale when they received the distribution. *Ib.*

43. **Specific Performance: Inference of Fact: Deference to Chancellor.** Inferences in their last analysis are but presumptions of a milder sort, and presumptions of fact fly away upon the entrance of proof. Where plaintiff swore that he did not know that defendant had a wife at the time the contract of lease with an option to purchase was entered into, and on the other side there are facts from which it could reasonably be inferred that if plaintiff did not know that defendant was married at that time he ought to have known it, the appellate court will defer to the finding of the chancellor on the point. *Tebeau v. Ridge*, 547.
44. ———: **Lease: Consideration for Option to Purchase.** When a lease of land for a period of years contains an option to the lessee to purchase at any time during the period at stipulated prices, the payment of the stipulated rent reserved is a sufficient consideration to support the agreement to convey, and such option is a continuing offer to sell at the price named up to the end of the period. And though such option agreement may not with precision dovetail into the lease contract, yet being a part of the same instrument and having been written by the lessor and signed by both, it will be considered an integral part of the contract. *Ib.*
45. ———: **Wife's Dower: Diminution.** Where the vendee, under a contract for the sale of the land signed by the vendor alone, is entitled to specific performance, there should be a diminution of the purchase price named in the contract by the present value of the wife's inchoate dower, estimated by the tables of mortality and by the statutes of present values of estates less than a fee. In other words, the contract being for the sale of the property for a named price, and that contract being one which, under the evidence, equity, in the exercise of a sound judicial discretion, should enforce, the vendor should not receive the whole purchase price, and then as a reward for his breach of contract be permitted to keep one-third of the title in a life estate in his family, but the value of that inchoate dower should be calculated in the manner prescribed by statute and deducted from the purchase-price agreed upon, and then the title be decreed to be, upon payment of the balance, in the vendee, subject to the wife's inchoate dower. [*Overruling Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671.] *Ib.*
46. ———: ———: ———: **Knowledge That Vendor was Married, etc.** The facts that the vendee at the time that the contract of purchase was signed by the vendor alone did not know that he had a wife; and that the vendor, prior to his refusal to convey the land to the vendee according to the contract, had not requested, and did not intend to request, his wife to sign the deed of conveyance, do not in anywise affect the interest of the wife in the land, nor authorize the court to compel her to convey her dower therein, nor do they preclude the court from decreeing specific performance by a diminution from the purchase price of the value of her inchoate dower. They only go

## LANDS AND LAND TITLES—Continued.

to matters of good faith, as such may affect the vendor or vendee. *Ib.*

47. ———: **Allegation of Ownership.** A decree for the specific performance of a contract for the purchase of land will not be reversed because the petition does not contain an allegation in apt terms that defendant was the owner of the land at the time of bringing the suit, where objection to the petition was first made in the motion in arrest, and the case was tried throughout by both parties as if it contained such allegation and defendant testified he was the owner. [Sec. 2119, R. S. 1909.] *Ib.*
48. **Fraudulent Conveyance: Avoiding Deed from Third Person to Debtor's Wife: Execution Sale: Combination: Inadequate Price: Equity.** Plaintiffs' petition states, that R traded his stock of goods and his note for \$2500, which he afterwards paid, for a hundred acres of land the title to which was taken in his wife; that the conveyance of the land was made in fraud of plaintiffs as creditors of R; that plaintiffs separately sued him in attachment and the writs were levied and the abstracts filed; that R made default and judgments were taken against him, under one of which execution was levied and the land sold for \$3 to L as trustee for plaintiffs, the execution being returned unsatisfied; that afterward R and his wife without consideration conveyed the land to defendant W in fraud of creditors, so that W became trustee for the plaintiffs; and that W in turn gave a purported deed of trust to defendant bank without consideration and likewise in fraud of creditors. The prayer asks that the original conveyance to R's wife, the conveyance to W, and the deed of trust be held fraudulent and void, and asks also for general relief. The decree held the conveyances fraudulent and void as against the sheriff's execution deed to plaintiffs—a conveyance not mentioned in the petition. *Held*, that the inadequacy of the price paid at the execution sale, in connection with the combination which by interposition of the trustee brought it about, rendered the sale feigned and colorable, and amounted to a fraud against R., the debtor, and accordingly the judgment must be reversed, and the cause remanded. [Only BROWN, WALKER, and WOODSON, JJ., concur in the opinion in this case: LAMM, C. J., and FARIS, J., concur in the result, while GRAVES and BOND, JJ., dissent.] *Shoe Co. v. Wyble*, 675.

## LARCENY.

1. **Instructions: "Feliciously."** Where in a prosecution for grand larceny the court instructed the jury to find the accused guilty if they believed from the evidence that he wrongfully took and carried away a pocketbook and money from the possession of M., with the intent to fraudulently convert it to his own use and permanently deprive the owner thereof without his consent, the same being the property of M., the failure to require a finding that accused's intent in taking and carrying away the things stolen was felonious did not render the instruction erroneous. *State v. Ward*, 149.
2. ———: **"Without Claim of Right."** Where the State's evidence tended to show that the accused picked the pocket of the prosecuting witness like an expert, that he was described to the police by his victim and was taken within an hour and

**LARCENY—Continued.**

a half with part of the money on him, and where he made no defense at the trial, a failure to require a finding that the taking was without claim of right would not be error, since the facts show there was no such claim. *Ib.*

3. **Evidence: Identity of Stolen Bank Notes.** Evidence as to the identity of national bank notes found on the accused with those stolen from the prosecuting witness held sufficient to take the question to the jury. *Ib.*
4. **Instructions: All the Law of the Case: Motion for New Trial: Appeal: Circumstantial Evidence.** Although the trial court's attention was at no time specifically called to a failure to instruct on circumstantial evidence, and the motion for new trial merely alleged that the court did not instruct on all the law of the case, still the Supreme Court is bound to see that no injustice is done by such omission, and it is *held*, in a trial for grand larceny, where direct evidence identifies the accused as the person who pressed against the prosecuting witness when his pocketbook was taken, and identifies money found on the accused as part of that then stolen, that an instruction on circumstantial evidence was not required. *Ib.*

**LAWS.**

1. **Real Estate: Law of Situs: Trustee Substituted by Foreign Court.** A resident of the State of Maryland devised lands in Missouri to trustees for sale and conversion. On the surviving trustee's *ex parte* application to a court of Maryland he was relieved and another citizen of that State was appointed to and assumed the trust. This last trustee, who was also sole administrator of the testator's estate *c. t. a.*, deeded the lands to one under whom defendants claim. *Held*, that the trustee's deed was ineffectual to transfer the title, only the courts of the *situs* having jurisdiction to deal directly with real property. *DeLashmutt v. Teetor*, 412.
2. **Statute: Repealing Statute Unconstitutional.** If an ostensible statute attempting to repeal certain sections of the Revised Statutes is unconstitutional and void, those sections, upon an adjudication that said repealing statute is void, are left in existence as live law. *State ex rel. v. Drabelle*, 515.
3. **Legislative Inaction.** Long legislative inaction after a court has placed an interpretation on a criminal statute favorable to defendant does not estop the State from enforcing it, nor can it be allowed to defeat its manifest purpose. *State ex inf. v. Athletic Club*, 576.
4. **Schools: State-Aid: Appropriation: Aided by Other Acts.** An act which attempts to grant State-aid to consolidated schools and rural high schools and provides that, when certain conditions have been complied with, certain sums of money shall be paid to the district out of the State Treasury, and that the State "shall make adequate appropriations for carrying out" said provisions, must be read in connection with the biennial school appropriation bill; and if, when that is done, both together constitute a "regular appropriation made by law," the act will not be held to be violative of section 43 of article 4 of the Constitution. *State ex rel. v. Gordon*, 631.
5. **Insurance Policies: Lex Loci: Venue: Margin.** A venue laid in the margin of the petition, thus, "In the Circuit

## LAWS—Continued.

Court, City of St. Louis, State of Missouri," will be the venue for all other matters requiring a venue arising from the petition, none special being pleaded. So that, where the petition is grounded on policies issued by an insurance company, alleged to be organized in another State, but authorized to do business in this State, it will not be *held*, in adjudging its sufficiency to state a cause of action, upon a demurrer thereto, that it is silent as to where the policies were executed or delivered, in that it contains no allegations showing they were governed by the laws of this State; for, if it alleges that the company was authorized to do business in this State at all times mentioned in the petition, that it did business by issuing the policies sued on on a given date, whereby it agreed to do certain things, and that plaintiff paid certain premiums and made certain demands of the company which he seeks to have enforced, those allegations, taken with the venue stated in the margin, are sufficient to authorize a holding that the policies are governed by the laws of this State and the contract is to be construed according to its statutes. *Orthwein v. Insurance Co.*, 650.

## LEASE.

**Specific Performance: Consideration for Option to Purchase.** When a lease of land for a period of years contains an option to the lessee to purchase at any time during the period at stipulated prices, the payment of the stipulated rent reserved is a sufficient consideration to support the agreement to convey, and such option is a continuing offer to sell at the price named up to the end of the period. And though such option agreement may not with precision dovetail into the lease contract, yet being a part of the same instrument and having been written by the lessor and signed by both, it will be considered an integral part of the contract. *Tebeau v. Ridge*, 547.

## LEGISLATION.

1. **Unconstitutional Statute: Blanket Ballot Law: Constitutional Majority.** A bill which failed to obtain a majority of all the members elected to either house of the General Assembly, as shown by a count of the recorded vote in the journal of that house, never became a law, although signed by the presiding officer of each and approved by the Governor. *State ex rel. v. Drabelle*, 515.
2. ———: ———: ———: **Count: Members Voting Aye as Shown by Journal.** The Constitution (Sec. 31, art. 4) says that "no bill shall become a law unless on its final passage the vote be taken by yeas and nays, and names of members voting for or against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor." Where, therefore, the whole number of members of the House was 142, a constitutional majority being 72, and the journal of the House in which the ayes and noes were recorded shows only 71 ayes for a certain bill, that bill never became a law, although the journal recites it had received a constitutional majority, and had been signed by the presiding officers of the House and Senate and approved by the Governor. All those constitutional requirements are essential prerequisites to the validity of a law, and one is just as essential as another; and since the Constitution says



## LEGISLATION—Continued.

that a majority of the members to each house shall be recorded on the journal as voting in its favor, unless the journal shows that fact the bill never became a law. Nor can recitals found in the journal to the effect that the bill received a constitutional majority be held to either dispute the recorded vote, or to weaken its effect to the extent of introducing doubt or uncertainty which would preclude courts from interfering.

*Held*, by GRAVES, J., dissenting, with whom WOODSON, J., concurs, that as the Constitution provides, in the same article, that no bill shall become a law until the same shall have been signed by the presiding officer, and that before he shall affix his signature he shall suspend all other business, "declare that such bill will now be read, and that, if no objections be made, he will sign the same to the end that it may become a law," and that "if no objection be made" he shall, in the presence of the House, in open session, and before any other business is entertained, affix his signature, "which fact shall be noted on the journal," and also provides that if any member shall object "that any particular clause of this article of the Constitution has been violated in its passage, such objection shall be passed upon by the House, and if sustained, the presiding officer shall withhold his signature," and that when a bill shall have been so signed in both houses, and approved by the Governor, it "shall become a law," a bill which by the journals is shown to have been signed by the presiding officers of both houses without any objection having been made, and approved by the Governor, should be held to be a law, although a count of the ayes and noes as recorded in the journal of one house shows a majority of the members elected thereto did not vote in its favor; that no objection being offered is strong evidence that no objection in fact existed; and that the provision that any "such objection shall be passed upon by the house" means that it is for the legislative body to adjudicate the question of whether a bill has been constitutionally passed, and that the House, having in this case adjudicated that the bill was legally passed, as is shown by its journal record that it received a "constitutional majority," the court cannot go behind such adjudication.

*Held*, also, that a bill properly attested by the presiding officers of the two houses and approved by the Governor, cannot be impeached in a court by a resort to the journal of one of them. That is the positive trend of modern adjudications, and should certainly be the rule in this State in view of our constitutional provision that "such objection shall be passed upon by the house."

*Held*, also, that if the journal impeaches itself, one part showing the bill did pass and another that it did not receive the necessary constitutional majority, the courts cannot interfere, since the rule everywhere accepted is that if doubt exists as to whether a bill received the necessary number of ayes that doubt must be resolved in favor of the due attestation of the presiding officers and the approval of the Governor; and in this case, not only does the journal say that the bill "was passed" and the memoranda indorsed on the bill say that it was "duly passed," and those recitals are impeached by a count of the names of those voting "aye" recorded in the journal, which shows 72 "ayes" (a bare constitutional majority), whereas by counting the names only 71 are found to have so voted,

## LEGISLATION—Continued.

but it also shows that one member is recorded as voting both "aye" and "no," and therefore the journal in the most positive way impeaches itself. *Ib.*

LEX LOCI. See Laws.

LIBEL. See Actions.

LICENSE TO SELL LIQUORS. See Intoxicating Liquors.

## LIMITATIONS.

1. **Unoccupied Land.** Where the evidence shows the lands were wild swamp land, covered with timber, uncultivated and in the possession of no one, neither the defense of limitations nor of estoppel, is available. *Russ v. Sims*, 27.
2. **Adverse Possession: Evidence.** Evidence *held* insufficient to establish title in defendant by adverse possession. *Stone v. Railroad*, 61.
3. **Suit to Quiet Title: Legal Title: Adverse Possession: Issue of Law: Verdict.** Where in a suit to quiet title the plaintiff stood on his legal title and the defendant claimed under the thirty-year Statute of Limitations, a square issue of law resulted, and the verdict of the trial court on that issue is conclusive. *Chilton v. Nickey*, 232.
4. ———: ———: ———: **Preponderance of the Evidence.** One claiming under the thirty-year Statute of Limitations must establish his possession by a preponderance of the evidence. *Ib.*
5. **Thirty-one Year Statute: Lawful Possession: Color of Title.** It is not reasonable to presume that defendant, who interposed the thirty-one year Statute of Limitations, held possession in good faith under a deed to her deviser concerning which the evidence does not show she had knowledge; and the trial court's finding that said defendant gained lawful possession from such deed was accordingly erroneous. *Abeles v. Pillman*, 359.
6. ———: ———: ———: **Ownership.** The term "lawful possession" used in the thirty-one year Statute of Limitations (R. S. 1909, sec. 1884) does not mean possession based upon ownership of the title to the land—this for the reason that the statute contemplates that the "lawful possession" shall continue for a year after the thirty-year period before the one so having lawful possession becomes *ipso facto* vested with the title of the claimant. It therefore follows that the person in lawful possession must be some one other than the owner. *Ib.*
7. ———: ———: **What is.** Color of title is not necessary to establish "lawful possession" under the thirty-one year Statute of Limitations. *Ib.*
8. ———: ———: **Special Findings: New Trial.** Where in ejectment the defendant asserted title to land under the thirty-one year Statute of Limitations, and the court found specially that, since he had color of title, said defendant was in "lawful pos-

**LIMITATIONS—Continued.**

session," but it appears upon appeal that the evidence does not support the finding of color of title, the case is reversed and remanded for a new trial, in the course of which evidence may be introduced upon the question whether or not defendant's possession was of such character as to be lawful, under the statute, without color of title. *Ib.*

9. ———: ———: **No Assessment of Taxes: Nonresident Owner.** Where a defendant in ejectment asserts title to the land under the thirty-one year Statute of Limitations (R. S. 1909, sec. 1884), one requirement of which is that neither the plaintiff nor those under whom he claims shall have paid any taxes on the land for thirty years, the plaintiff will not be excused, no taxes having been paid, by a showing that the record owner was not a resident of the State and that the land was never assessed for taxes, said owner having testified that he had made no inquiry about the land and thought it worthless. *Ib.*

**MASTER AND SERVANT.**

1. **Negligence: Fellow-Servant: Superintendent: Directing Work in Hand.** A superintendent of a mill, in full control of its management and of all men employed therein, who directed a millwright, employed for a month to make alterations in bleachers and working under his directions, and the alterations being completed and ready for testing, to assist him in the hazardous work of putting on a belt connecting the bleachers with the power, was a vice-principal, and not a fellow-servant of the millwright; and though the immediate work was extra hazardous and the field of operation was unreasonably unsafe and the injury was due to the superintendent's own negligence in not using proper care to protect the millwright, the doctrine of fellow-servant does not bar a recovery. *Strother v. Milling Co.*, 1.
2. ———: **Inspection of Freight Cars by Railroad.** As regards liability to its employees, it is the duty of a railroad company to discover dangerous defects in cars and equipment received from other roads, if the defect be such as can be discovered by the exercise of ordinary care. *Near v. Railroad*, 80.
3. ———: ———: **Ordinary Care: Defective Brake.** The plaintiff, a switchman employed by defendant, was injured while setting a tunnel brake on a box car received from another road and previously inspected by defendant. Plaintiff's evidence tended to show that the brake was defective; that after it was broken from one-third to two-thirds of the broken end looked like a fresh break; that the break occurred near the place where the staff entered the brake wheel; that the break was irregular, beginning one-fourth to one-sixteenth of an inch outside the socket of the brake wheel and extending a like distance down into the square portion of the staff covered by the wheel socket; that the old break appeared on the end of the broken portion which extended out of the socket; and that the staff broke because of said defect while plaintiff was applying the brake, causing him to fall and be injured. Plaintiff testified that he tested the brake when he first boarded the car, and that it sounded all right. *Held*, that plaintiff failed to make a case for the jury, there being no obligation on the defendant to use more than ordinary care in inspection, whereas only extraordinary precaution, such, for

## MASTER AND SERVANT—Continued.

example, as taking the brake to pieces, would have revealed the defect. *Ib.*

4. ———: **Pleading: Defective Cross-Arm: Designed to Support Lineman.** Although the petition does not categorically aver that the cross-arm upon which plaintiff was resting a part of his weight while attempting to remove a transformer from an electric light pole and to replace it with a larger one, was intended to support his weight while he was performing that work, yet if it alleges that fact with sufficient clearness to notify the defendant company that the rotten condition of the cross-arm was the cause of his falling, defendant, having neglected to demur or to move to make the petition more definite, will not be heard to complain, after verdict, that the petition was insufficient in that respect. *Rutledge v. Swinney*, 128.
5. ———: **Defective Cross-Arm: Inspection: Facts of Case.** Plaintiff was directed to assist defendant's foreman and two other employees in removing from the cross-arm of an electric light pole a transformer and replacing it with a larger one. Some of the poles had become rotten at the ground, and many of the cross-arms used to support wires and transformers were defective and had to be replaced with new ones. After the old transformer was lowered to the ground and a new one raised and hung upon the cross-arm, plaintiff, whose duty it was to connect and solder several wires and in doing which it was necessary for him to go both above and below the transformer, on account of the position of numerous wires was compelled to unfasten his belt from the pole and climb over the transformer, and in doing so was unable to secure a hold upon the pole with his hands, but was compelled to sustain himself by taking hold of the cross-arm from which the transformer was hanging. The cross-arm appeared sound, but a short distance from the pole it was sound only at the exterior, the interior being rotten, so that when plaintiff placed a part of his weight upon it it broke, and its decayed condition was the immediate cause of his fall. Plaintiff's testimony is to the effect that it was not his duty to inspect poles or cross-arms; that the foreman had recently been going over the system and inspecting them, and required plaintiff and other employees to replace with new ones those found to be decayed; that a new cross-arm had recently been placed above the one that broke; that the work was a "rush job" and plaintiff was not furnished with tools for inspecting cross-arms, which could be properly done only with a hand ax or hammer and chisel; and that he looked and saw that the cross-arm which broke appeared to be sound. It was apparently necessary for him to remove his belt from the pole, and he is not charged with negligence in that respect. *Held*, that a reasonable degree of care would have led the foreman to have carefully inspected the cross-arm, or to have furnished plaintiff with suitable tools and instructed him to inspect it before installing the transformer, and the case was one for the jury. *Ib.*
6. ———: **Imputed or Inferential: Facts and Circumstances.** Where all the facts connected with an accident fail to point to the negligence of the defendant as the proximate cause of the accident, but show a state of affairs where an inference could be as reasonably drawn that the accident was

**MASTER AND SERVANT—Continued.**

due to a cause or causes other than the negligent act of the defendant, then the plaintiff cannot rely upon mere proof of the surrounding facts and circumstances of the accident, and the defendant is not called upon to explain the cause of the accident and to purge himself of the imputed or inferential negligence. *Hartman v. Railroad*, 279.

7. ———: ———: ———: **Leaning from Engine: Bent Handhold: Contributory Negligence.** The plaintiff, a fireman in defendant's employ, advanced to the opening between the cab and the tender while the engine was running and, reaching, but not looking, for the handholds on cab and tender, leaned out. He missed a handhold, fell and was injured. The handhold on the tender, five feet long, was bent in near the middle in such manner that, instead of being three inches throughout from the tender wall, it varied from an inch and a half to three inches. *Held*, that plaintiff's own evidence shows that he was guilty of contributory negligence, and a peremptory instruction to find for defendant should have been given. *Ib*.
8. ———: **Insurer of Safety.** An employer is not an insurer of the safety of an employee while on his premises. Nor is the conduct of the master's business to be subjected to the shifting rules of alleged safety arbitrarily devised and set up to fit the actionable necessities of every casualty. *McGinnis v. Brick Co.*, 287.
9. ———: **Mud Scraper.** In front of defendant's office was a mud scraper, intended to be used by persons entering the building in scraping mud from their shoes. To a board ten inches wide, driven into the ground, was attached at the top with bolts a piece of sheet iron, which had been bent over until it was only about four inches above the pavement, and extending outwardly from the board about three inches. Plaintiff, an employee, who had been at the office only a few times in the course of four months, went to the office for instructions as to his work, and as he came down the steps and turned towards one of defendant's wagons his right foot caught under the projecting iron of the mud scraper, and he was thereby thrown to the ground, and his wrists badly injured. The time was 7:30 in the morning, early in October, and the day was bright. He did not see the scraper, nor did he look for it. *Held*, that he was guilty of contributory negligence, as a matter of law, and cannot recover damages. *Ib*.
10. ———: ———: **Rule of Care.** The same rule of care applies to an employee who goes to his master's office for instructions about his work as would apply if he were actually at work there. All the duties the master owes him while on the premises attach at the moment of his injury; and that duty is to provide him a reasonably safe way of ingress and egress; and it is likewise the reciprocal duty of the servant to use his senses to see an appliance plainly in sight which the master had the right to install; and if, in broad daylight, he fails to see a permanent appliance, in plain view, located where the master had a right to place it, he is guilty of contributory negligence. *Ib*.
11. ———: **Starting Engine Suddenly Without Warning: Evidence: Question for Jury.** Plaintiff, a switchman in defendant's employ, had ridden in the cab of a switch engine

## MASTER AND SERVANT—Continued.

while it backed westward on track 5 in defendant's yards until it neared a switch connecting that track with track 4, parallel thereto on the north. There the engine stopped, hardly in the clear, while the foreman of the crew walked to a shanty south of the tracks and west of the switch, to report to the yardmaster. On track 4 stood a freight train headed west, with its engine near the switch. As this freight "whistled off," preparatory to pulling out westward, it was discovered that the switch engine was not in the clear, and accordingly the engineer moved it one or two car lengths east of the point of clearance. The freight conductor signaled his train to "come ahead" and it started. About that time plaintiff alighted from the cab of the switch engine and walked westward beside it on the south until he was five or ten feet beyond the tender, where he started to cross the track on his way to the shanty. Meantime the foreman signaled the switch engine to cross the switch ahead of the freight. The engine backed suddenly, and the tender struck the plaintiff just after he stepped upon the track. The engineer and fireman testified that the bell was rung as the engine started, but there was testimony to the contrary. *Held*, that the questions whether plaintiff in so attempting to cross the track failed to use ordinary care, and whether the switch engine was started without warning in such way and under such circumstances as to constitute negligence on defendant's part, were for the jury. *Ostertag v. Railroad*, 457.

12. ———: **Semaphore: Purpose.** The system of signals devised to govern the movement of railroad trains, called a "semaphore," consisting in the daytime of oscillating arms or blades elevated above station houses, and in the nighttime of lights displayed therefrom, by which the operator, while at the electric key, can shift the signals so as to indicate to the engineer of an approaching train whether the track is clear or otherwise, was designed to facilitate the movement of trains by requiring a full stop only when an obstruction intervenes, or a stop is necessary for the delivery of orders. Therefore, to accomplish the purpose of a rule declaring that "all trains will approach Cole Junction under full control" two things were primarily necessary on the part of the engineer, namely, to bring his train under full control, and to observe that the signal shone white at night, which white signal indicated that the track was clear and that he was not required to stop for orders. The observance of this rule was paramount to all others; and if the engineer had his train under control and ready to stop until he observed the semaphore showed a white light, and then proceeded, and ran into a train on the track, he was not guilty of negligence; and especially, if in addition to the semaphore notice of a clear track, the initial switch lights were "right." *Finnegan v. Railroad*, 481.
13. ———: ———: **Switch Lights.** A rule that requires trains to "approach the end of double-track junction points prepared to stop unless the switches and signals are right and the track clear" does not mean that the engineer is not authorized to proceed unless the switch lights at the other end of the tracks, pointing away from the train, are right; that would be to give it an absurd construction. If it means the switch lights located at the approach of the junction and those required by another rule in reference to semaphore signals, and

**MASTER AND SERVANT—Continued.**

the engineer observed both, and both were right, he was not guilty of negligence in proceeding with his train. *Ib.*

14. ———: ———: **Go Ahead Rear End Signal: Conflicting With Semaphore Rule: Presumption of Observance.** A rule declaring that "no freight train must pass any station or siding at which it is not required to stop, without the enginemen receiving go-ahead signal from rear end," if a requirement in addition to the time card rule authorizing the engineer to proceed when the semaphore signal shone white, was in conflict therewith and may be disregarded; and in the absence of any testimony as to whether or not there was a go-ahead signal, even if the rule is of general application, the presumption is that it was observed. *Ib.*
15. ———: **Rules for Operating Trains: Custom.** A usage or custom on the part of trainmen may be shown to be at variance with or in modification of a printed rule, when the company, through its proper officers, had knowledge of its violation; and that knowledge need not be shown to have been actual, but may be implied from the notoriety of the custom or inferred from the circumstances which of themselves would imply notice. And hence, where the evidence establishes that it had become the custom of engineers to slow down their trains until they observed a white light in the semaphore, and then to proceed, an engineer cannot be charged with negligence for proceeding after he had seen said white-light signal, even though there be rules requiring him to approach the junction under full control, and prepared to stop unless there are rear-end go-ahead signals. *Ib.*
16. ———: **Movement of Trains: Full Control: Evidence of Meaning.** The term "full control" as applied to the movement of a train is technical, and while railroad operatives may well understand its meaning, a jury may not, and hence it is competent to show by such operatives that it did not mean a full stop of the train; and if the evidence shows that when the freight train was within twelve or fourteen hundred feet of the junction, which the rules required all trains to approach "under full control," the engineer reduced the speed of the train to twelve or fifteen miles an hour, which would have enabled him to come to a full stop in six or seven hundred feet, and then seeing that the initial switch lights were "right" and that the semaphore light showed white, which was a signal that the track was clear, he increased his speed, it is competent for the court to instruct the jury that, if they find this evidence to be true, the rule as to "full control" was complied with. *Ib.*
17. ———: ———: **Expert Testimony: Hauling Train in Usual and Proper Manner.** The usual and ordinary manner of operating railroad trains is a subject of expert evidence. It is proper to permit the train dispatcher, who had charge of the movement of trains on the division on which one freight train collided with another, and knew the significance of train orders, signals and switch lights, to testify as to the purpose and meaning of signals, switch lights, dispatches sent and delivered, and the usual and customary manner of running trains at the point of the accident, for the purpose of enabling the court or jury to fully understand the facts in the given case, in order that the appropriate rules of law may be applied thereto. *Ib.*

**MASTER AND SERVANT—Continued.**

18. ———: **Instruction: Trains: Meaning of Orders.** The words "orders" and "rules" as applied to the movement of trains are synonymous, and there is no difference in their practical application. An instruction telling the jury that "the orders to the engineer and signals displayed authorized him," etc., is justified by the evidence, if the rules of the company, or their substituted custom, familiar to every operative, authorized the instruction, for such rules and custom had the practical force and effect of an order. *Ib.*

**MISTAKE.**

**Taxes: Paid to City by Mistake of Law.** A payment of road and bridge taxes belonging to a township, collected by a township collector and the county treasurer as *ex officio* county collector, made to the treasurer of the city situated in said township, under the mistaken view that under the law said taxes belonged to the city, is no bar to a recovery by the township of the money so paid. The rule that a payment made in mistake of law cannot be recovered, does not apply to a municipality. [*Distinguishing Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264, and *State ex rel. v. Hawkins*, 169 Mo. l. c. 618.] *Lamar Township v. Lamar*, 171.

**MORTGAGES AND DEEDS OF TRUST.**

1. **Substitute Trustee: Sheriff: Ex parte Appointment.** The fact that the court's appointment of the sheriff as substituted trustee to sell land was made on an *ex parte* application of the beneficiary in the deed of trust, does not render the appointment invalid. *Stone v. Railroad*, 61.
2. **Foreclosure Deed not Recorded: Purchase of Equity of Redemption.** A recorded deed of trust is constructive notice that the legal title is outstanding in the trustee, and one who, without notice of the foreclosure of the deed of trust, purchases the equity of redemption ten years after the foreclosure but before the recording of the foreclosure deed, is not entitled, in a suit to quiet title, to have the foreclosure deed declared void, although meanwhile he has completed and operated a railroad upon the land in question. *Ib.*
3. **Sale: Redemption: Laches: One Year and Eleven Months.** Where the cotenant in possession offered to pay off the note secured by a deed of trust on the property, and the legal holder (the defendant) refused to indorse the note to him unless it was to be marked paid, and for that reason the tender was not continued, and about four weeks after the sale to said mortgagee that cotenant surrendered peaceable possession to him, and he proceeded to construct buildings thereon worth three times the value of the property at the time of the sale, and the said mortgagors delayed for one year and eleven months after the sale was made before bringing suit to set the sale aside, and gave him no notice that they claimed the sale was unfair and though aware of the improvements being erected made no objection thereto and asserted no claim to the property, their delay in instituting their suit bars their right to recover. *Roby v. Smith*, 192.
4. ———: ———: **Inadequacy of Price.** Inadequacy of price is not alone a sufficient ground for setting aside a sale under



## MORTGAGES AND DEEDS OF TRUST—Continued.

a deed of trust; and though the property sold for one-fourth its value, and though one of the mortgagors offered to pay the mortgage note before the sale, but the tender was refused because he was not willing to have the note marked paid but wished to have it indorsed to him, yet if the preponderance of the evidence is to the effect that the sale was fairly conducted, and after it was made the property was peaceably surrendered to the mortgagee as purchaser, and he proceeded to make valuable improvements thereon, and the mortgagors, though aware of such facts, made no claim to said property or objections to said improvements, the sale will not be set aside at their suit instituted one year and eleven months after said sale. *Ib.*

## MOTION FOR NEW TRIAL.

**Appeal: Bill of Exceptions: Record Proper.** Where the correct bill of exceptions does not contain plaintiffs' motion for new trial or any call for it, appellate review must be limited to the record proper, and where that is free from error the judgment will be affirmed. [See *Haggerty v. Ruth*, 259 Mo. 221.] *McKee v. Donner*, 378.

## MURDER.

1. **Verdict: Using Word Information Instead of Indictment.** Where the jury in their verdict say they find the defendant guilty "in manner and form as charged in the information," whereas he was tried under an indictment preferred by a grand jury, the mistake of using the word "information" instead of the word "indictment" is not error. The rights of the defendant are not prejudiced by such mistake. *State v. Taylor*, 210.
2. **——: Two Defendants: Joint Verdict: Irregularly Worded.** Where two defendants are jointly indicted for the same murder and jointly tried, a verdict reading, "We, the jury, find the defendants guilty in manner and form as charged in the information and assess their punishment at life imprisonment," violates the express letter of the statute (Sec. 5252, R. S. 1909) which says that when several defendants are jointly tried their punishment shall be assessed separately and not jointly; and it is also imperfect and irregular in that it assesses the punishment at "life imprisonment." But such a verdict is tantamount to a general verdict of guilty, which fails to assess any punishment, since the punishment is erroneously assessed. In such case it is competent for the court himself to assess the punishment at ninety-nine years' imprisonment in the penitentiary, as he is authorized by statute to do (Sec. 5254, R. S. 1909), instead of at life imprisonment, as the jury evidently attempted to do. Under such circumstances, the verdict is not reversible error, although the court subsequently granted a new trial to appellant's coindictor, and thereafter he was discharged upon a *nolle prosequi*. *Ib.*
3. **Statement of Coindictor: Failure to Instruct: Collateral Matter.** Where two defendants are jointly indicted and tried for the same murder, it is not error for the trial court to instruct the jury in behalf of appellant that any statement made by his coindictor is not binding upon appellant, (1) if there is no evidence of any statement having been made by said coindictor which tends to connect appellant with their joint case,

## MURDER—Continued.

or (2), even if there is such testimony, unless appellant requests such an instruction, since the matter is a collateral one and is not strictly within the purview of section 5231, Revised Statutes 1909. *Ib.*

4. **Instruction: Wrong Date of Deceased's Death.** Where deceased was found dead on August 8, 1910, and defendants were tried in December, 1912, an instruction telling the jury that if they find and believe that "at any time prior to the filing of the indictment" defendants did strike and beat deceased with a heavy iron bar, "and that within a year and a day thereafter, to-wit, on the — day of August, 1912, he died from the effects of such striking and beating," they should find the defendants guilty, contains only a clerical mistake in stating the date of deceased's death as "on the — day of August, 1912," which is without substance, since the jury are expressly required to find that deceased died within a year and a day after he was assaulted, which cures the palpable clerical error of 1912, and besides, since it is a murder case, it is wholly unimportant when the prosecution was begun, if deceased died within a year and a day after he was assaulted. *Ib.*
5. ———: **Defendant's Failure to Testify: Refusal of Instruction Not to Consider.** It is not reversible error to refuse an instruction asked by defendant to the effect that the jury are not to consider as any evidence of his guilt or innocence the failure of defendant to testify in his own behalf. [Following *State v. Robinson*, 117 Mo. 649.] Neither is it error for the trial court to give such an instruction. [Citing *State v. DeWitt*, 186 Mo. 61.] And it would perhaps be a little fairer to defendant to give such an instruction, if he asks it; but in view of the dark and muddy language of Sec. 5243, R. S. 1909, and the holding in the *Robinson* case, it cannot be held to be reversible error not to give it. *Ib.*
6. **New Trial: As to One Defendant: Not as to Other.** The granting of a new trial to one of two defendants, jointly indicted and jointly tried and jointly found guilty by the same general verdict, is not *ipso facto* a granting of a new trial to the other. *Ib.*
7. ———: **Sufficiency of Evidence: Where it Might Properly Have Been Granted.** Although the Supreme Court may be of the opinion that the trial court, in view of the evidence, should have granted to appellant a new trial, it will not on that ground hold that the trial court committed error if there is substantial evidence of defendant's guilt. The Supreme Court has nothing to do with the credibility of the evidence; its weight and credibility are for the jury, and if their verdict meets the approval of the trial judge the Supreme Court, although the strange fact that the State's main witness is accused's own sister and the deceased was to her unknown may challenge attention, cannot compel a new trial on the theory that her testimony is contrary to human experience, her testimony being substantial and if true showing defendant's guilt, and bearing the earmarks of verity, and there being no showing of enmity or unfriendliness on her part for accused, and nothing in her manner of testifying or conduct from which either could be inferred. *Ib.*

## NEGLIGENCE.

1. **Fellow-Servant: Superintendent: Directing Work in Hand.** A superintendent of a mill, in full control of its management and of all men employed therein, who directed a millwright, employed for a month to make alterations in bleachers and working under his directions, and the alterations being completed and ready for testing, to assist him in the hazardous work of putting on a belt connecting the bleachers with the power, was a vice-principal, and not a fellow-servant of the millwright; and though the immediate work was extra hazardous and the field of operation was unreasonably unsafe and the injury was due to the superintendent's own negligence in not using proper care to protect the millwright, the doctrine of fellow-servant does not bar a recovery. *Strother v. Milling Co.*, 1.
2. **Putting Belt on Pulley: Crippled Hand of Superintendent: Instruction to Disregard: Limiting Effect: New Trial.** Where the plaintiff was injured by the fact that the superintendent pushed a heavy belt onto a dead pulley while plaintiff's ladder was leaning against the shaft as he was endeavoring to "hand up the slack," without giving warning to plaintiff that the belt was about to begin to "crawl," whereby plaintiff was thrown to the floor, and the petition described the superintendent as "physically incapacitated to do such work," and plaintiff testified that he did not know the superintendent had a crippled hand, and the superintendent denied that its crippled condition interfered with his use of it, and plaintiff's instructions tendered no issue on the condition of that hand, it cannot be held that an instruction for defendant telling the jury that "there is no evidence in the case that the condition of the superintendent's left hand directly caused, or directly contributed to cause the plaintiff's injuries, and your finding on that issue must be for defendant," merely limited the effect of the evidence, since it was so worded as to entirely destroy its effect. Nor, on the other hand, will it be held, since neither on defendant's nor plaintiff's theory did the crippled hand connect itself in a causal way with the accident, that the giving of the instruction was a sufficient ground for granting plaintiff a new trial. *Ib.*
3. **——: Instruction: Diverting Jury's Minds From Issue.** An instruction should focus the minds of the jury on the real issues of the case, and not divert them therefrom. It should not lug in imaginary defenses unsupported by the evidence. Where plaintiff was assisting the superintendent of a mill to place a heavy belt upon a dead pulley, and both sides agree that it was the duty of the superintendent to give him notice when the belt began to "crawl" onto the pulley, and the vital issue is whether or not such notice was given, an instruction telling the jury that, though they may believe from the evidence that the superintendent "was negligent in the performance of the work in which he and plaintiff were engaged, and such negligence was the direct cause of plaintiff's injuries, yet if you further believe from the evidence that such negligence consisted solely in the superintendent's choice of the method of performing such work," you will find for defendant, is erroneous, since there was no evidence tending to show that "the choice of the method of performing such work" was the *only* negligence of the master. *Ib.*
4. **Assumption of Risk: No Basis of Fact.** Where the vital question in the case is whether the master gave the notice to the

## NEGLIGENCE—Continued.

employee which it was his duty to give, and for failure to give which the injury resulted, there is no room in the case for an instruction on assumption of risks. Risks assumed by the servant are those which remain after the master has exercised ordinary care. And in this case it is held that the natural effect of such an instruction was to confuse and mislead the jury. *Ib.*

5. **Due Care: High-Sounding Definition.** It is better that instructions use the words "due care" and then define what such care is, and not tell the jury that plaintiff "was bound to use his senses, intelligence and experience"—words calculated to lead astray the minds of common-sense jurors. *Ib.*
6. **Master and Servant: Inspection of Freight Cars by Railroad.** As regards liability to its employees, it is the duty of a railroad company to discover dangerous defects in cars and equipment received from other roads, if the defect be such as can be discovered by the exercise of ordinary care. *Near v. Railroad*, 80.
7. ———: ———: **Ordinary Care: Defective Brake.** The plaintiff, a switchman employed by defendant, was injured while setting a tunnel brake on a box car received from another road and previously inspected by defendant. Plaintiff's evidence tended to show that the brake was defective; that after it was broken from one-third to two-thirds of the broken end looked like a fresh break; that the break occurred near the place where the staff entered the brake wheel; that the break was irregular, beginning one-fourth to one-sixteenth of an inch outside the socket of the brake wheel and extending a like distance down into the square portion of the staff covered by the wheel socket; that the old break appeared on the end of the broken portion which extended out of the socket; and that the staff broke because of said defect while plaintiff was applying the brake, causing him to fall and be injured. Plaintiff testified that he tested the brake when he first boarded the car, and that it sounded all right. *Held*, that plaintiff failed to make a case for the jury, there being no obligation on the defendant to use more than ordinary care in inspection, whereas only extraordinary precaution, such, for example, as taking the brake to pieces, would have revealed the defect. *Ib.*
8. **Contributory: Collision: Danger Signals: Question for Jury.** On a dark, drizzly night the interurban trolley car on which plaintiff was motorman collided with a work car which stood between stations with no tail light burning. Another car was at the time from one to three car lengths beyond the work car and coming up, with headlight burning, on a parallel track eight or ten feet from that on which plaintiff's car was running. The window directly in front of plaintiff in the vestibule was closed, but that to his right was open. *Held*, that the question whether plaintiff was negligent in failing to see the work car was for the jury. *Kinney v. Railroad*, 97.
9. ———: ———: ———: **Custom: Evidence: Pleading.** Where the petition charges common-law negligence in an action by a motorman for injuries received in a rear-end collision, and alleges that the car with which his collided was without rear lights, evidence of a rule and custom of the company to keep a red signal light on the rear of cars at night is admissible, even though such rule and custom be not pleaded. *Ib.*

## NEGLIGENCE—Continued.

10. **Loss of Leg; Improper Remarks of Counsel; Verdict; Remittitur.** The plaintiff, a motorman employed by defendant, lost a leg as a result of a rear-end collision with a car which he alleges burned no signal lights behind. His petition asked for \$50,000 damages, and an instruction authorized the jury, if they should find for him, to assess the damages at "not to exceed" that sum. Defendant's employees fully supported the plaintiff as to the facts of defendant's negligence. Plaintiff's counsel in his argument asked the jury to imagine as plaintiff a female passenger on the car, and when an objection was sustained to that he turned to picture plaintiff's battle with defendant's legal department and claim agents. An objection to that was overruled, and then counsel, until stopped by the court, argued about the objections, once stigmatizing them as "tricks of the trade." The jury returned a verdict for \$20,000, and judgment was entered for \$15,000 after compulsory remittitur of \$5000. *Held*, that, although the conduct of plaintiff's counsel was most reprehensible, yet, since it seems plaintiff would have had a verdict in any event, it is not reversible error; but in view of the fact that the court has hitherto refused to affirm judgments for more than \$10,000 for the loss of a leg, counsel's misconduct affords ground for requiring a further remittitur for \$5000. *Ib.*
11. **Pleading: Defective Cross-Arm: Designed to Support Lineman.** Although the petition does not categorically aver that the cross-arm upon which plaintiff was resting a part of his weight while attempting to remove a transformer from an electric light pole and to replace it with a larger one, was intended to support his weight while he was performing that work, yet if it alleges that fact with sufficient clearness to notify the defendant company that the rotten condition of the cross-arm was the cause of his falling, defendant, having neglected to demur or to move to make the petition more definite, will not be heard to complain, after verdict, that the petition was insufficient in that respect. *Rutledge v. Swinney*, 128.
12. **Defective Cross-Arm: Inspection: Facts of Case.** Plaintiff was directed to assist defendant's foreman and two other employees in removing from the cross-arm of an electric light pole a transformer and replacing it with a larger one. Some of the poles had become rotten at the ground, and many of the cross-arms used to support wires and transformers were defective and had to be replaced with new ones. After the old transformer was lowered to the ground and a new one raised and hung upon the cross-arm, plaintiff, whose duty it was to connect and solder several wires and in doing which it was necessary for him to go both above and below the transformer, on account of the position of numerous wires was compelled to unfasten his belt from the pole and climb over the transformer, and in doing so was unable to secure a hold upon the pole with his hands, but was compelled to sustain himself by taking hold of the cross-arm from which the transformer was hanging. The cross-arm appeared sound, but a short distance from the pole it was sound only at the exterior, the interior being rotten, so that when plaintiff placed a part of his weight upon it it broke, and its decayed condition was the immediate cause of his fall. Plaintiff's testimony is to the effect that it was not his duty to inspect poles or cross-arms; that the foreman had recently been going over the system and inspecting them, and required plaintiff and other employees to replace with new ones those found

## NEGLIGENCE—Continued.

to be decayed; that a new cross-arm had recently been placed above the one that broke; that the work was a "rush job" and plaintiff was not furnished with tools for inspecting cross-arms, which could be properly done only with a hand ax or hammer and chisel; and that he looked and saw that the cross-arm which broke appeared to be sound. It was apparently necessary for him to remove his belt from the pole, and he is not charged with negligence in that respect. *Held*, that a reasonable degree of care would have led the foreman to have carefully inspected the cross-arm, or to have furnished plaintiff with suitable tools and instructed him to inspect it before installing the transformer, and the case was one for the jury. *Ib*.

13. ———: ———: **Disregarding Evidence.** Unless the testimony on which the verdict rests is so utterly at variance with the admitted or known physical facts as to require it to be cast aside, it will not be disbelieved by the appellate court. *Ib*.
14. ———: ———: **Opportunity of Inspection.** Where there was evidence that the work of replacing the transformer with a new one, on the decayed cross-arm, was a "rush job" and that the lineman was not furnished with tools for inspecting the cross-arm, it was not error for the instruction to include, as an element of his right to recover for injuries caused by the breaking of the cross-arm, that he "did not have the opportunity, time and means to discover the condition of the cross-arm." *Ib*.
15. ———: **Instruction for Defendant: No Evidence.** It is not error to refuse an instruction for defendant if there is no sufficient evidence upon which to base it. If the evidence does not tend to establish a custom among the defendant's linemen of inspecting cross-arms before they went upon them, it is not error to refuse an instruction basing a defense upon such custom. *Ib*.
16. ———: ———: **Refused Covered by Those Given.** It is harmless error to refuse an instruction for defendant whose theory of defense is covered by others given. Even though it be conceded there was slight evidence to support an instruction telling the jury that if it was the duty, under the system of employment adopted by defendant, for each lineman to inspect cross-arms before going upon them, any error in refusing that instruction was cured by another given telling the jury that even though linemen frequently placed their weight upon cross-arms, it was plaintiff's duty, before placing his weight upon the cross-arm in question, to exercise ordinary care to ascertain whether it was adequate to bear his weight, and if he failed to exercise such care he could not recover. *Ib*.
17. **Excessive Verdict: \$9000.** Plaintiff, a strong man twenty-nine years old, with large experience in handling and repairing electrical appliances and in doing signal work on railroads, earning at the time of his injury \$65 per month and prior thereto as much as \$85, while engaged in substituting on a cross-arm of an electric light plant a transformer with a larger one, fell to the ground, breaking a bone at the elbow, which has never been removed, and so tearing loose the muscles from the bone as to render that arm useless. One of his ears was so injured internally that he has lost the power to hear

## NEGLIGENCE—Continued.

through it; the muscles of one side of the body are withered and atrophied, which has given him a lop-sided appearance; his general health has declined, and his weight been reduced from 152 to 121 pounds; the pains produced by the injuries were so great that within a few hours his reason was temporarily dethroned, and the pains continued for two weeks; and whether or not the loose bone in the arm can be so treated or operated upon that he can again use the arm, is left in doubt by the testimony of the physicians. *Held*, that a verdict for \$9000 is not excessive. *Ib*.

18. **Imputed or Inferential: Facts and Circumstances.** Where all the facts connected with an accident fail to point to the negligence of the defendant as the proximate cause of the accident, but show a state of affairs where an inference could be as reasonably drawn that the accident was due to a cause or causes other than the negligent act of the defendant, then the plaintiff cannot rely upon mere proof of the surrounding facts and circumstances of the accident, and the defendant is not called upon to explain the cause of the accident and to purge himself of the imputed or inferential negligence. *Hartman v. Railroad*, 279.
19. ———: ———: ———: **Leaning from Engine: Bent Handhold: Contributory Negligence.** The plaintiff, a fireman in defendant's employ, advanced to the opening between the cab and the tender while the engine was running and, reaching, but not looking, for the handholds on cab and tender, leaned out. He missed a handhold, fell and was injured. The handhold on the tender, five feet long, was bent in near the middle in such manner that, instead of being three inches throughout from the tender wall, it varied from an inch and a half to three inches. *Held*, that plaintiff's own evidence shows that he was guilty of contributory negligence, and a peremptory instruction to find for defendant should have been given. *Ib*.
20. **Master and Servant: Insurer of Safety.** An employer is not an insurer of the safety of an employee while on his premises. Nor is the conduct of the master's business to be subjected to the shifting rules of alleged safety arbitrarily devised and set up to fit the actionable necessities of every casualty. *McGinnis v. Press Brick Co.*, 287.
21. ———: **Mud Scraper.** In front of defendant's office was a mud scraper, intended to be used by persons entering the building in scraping mud from their shoes. To a board ten inches wide, driven into the ground, was attached at the top with bolts a piece of sheet iron, which had been bent over until it was only about four inches above the pavement, and extending outwardly from the board about three inches. Plaintiff, an employee, who had been at the office only a few times in the course of four months, went to the office for instructions as to his work, and as he came down the steps and turned towards one of defendant's wagons his right foot caught under the projecting iron of the mud scraper, and he was thereby thrown to the ground, and his wrists badly injured. The time was 7:30 in the morning, early in October, and the day was bright. He did not see the scraper, nor did he look for it. *Held*, that he was guilty of contributory negligence, as a matter of law, and cannot recover damages. *Ib*.

## NEGLECT—Continued.

22. ———: ———: Rule of Care. The same rule of care applies to an employee who goes to his master's office for instructions about his work as would apply if he were actually at work there. All the duties the master owes him while on the premises attach at the moment of his injury; and that duty is to provide him a reasonably safe way of ingress and egress; and it is likewise the reciprocal duty of the servant to use his senses to see an appliance plainly in sight which the master had the right to install; and if, in broad daylight, he fails to see a permanent appliance, in plain view, located where the master had a right to place it, he is guilty of contributory negligence. *Ib.*
23. Street Railways: Instructions: Applicable to Issues: Going Into Danger. Where the allegation of negligence in the petition, especially when given the liberal construction to which it is entitled after verdict, is wide enough to embrace the meaning that plaintiff was moving toward the fixed path of defendant's cable car under such circumstances as would cause him to be struck if the gripman did not do certain things about the operation of the car, or give warning of its approach, an instruction which used, as regards the plaintiff's acts, the phrase "going into" a situation of danger, as well as the phrase "in such situation," does not enlarge the issues framed by the petition, and, furthermore, defendant should not be heard to complain in that regard on appeal, after having adopted practically the same theory in one of its own instructions. *Holzemer v. Railroad*, 379.
24. ———: ———: Going Into Danger: Duty of Gripman. Where the evidence shows that plaintiff, at a street crossing, started southeasterly across the parallel tracks of defendant's cable railway, and thus unwittingly turned his back somewhat toward an eastbound car which struck him after he had crossed the north track, on which a westbound car also was approaching, and from the time he started to cross the tracks the gripman by the use of ordinary care could have seen him, it cannot be said that an instruction that it was the gripman's duty to act when he saw or could have seen the plaintiff going into a situation of danger was erroneous because not supported by the evidence. *Ib.*
25. ———: Going Into Danger: Warning: Question for Jury. Evidence in an action for damages by one run down by a cable car held to show that by the exercise of ordinary care the gripman could have seen plaintiff's danger in time to warn him; and accordingly it was for the jury to say whether the giving of an alarm would have aided in preventing the injury. *Ib.*
26. ———: ———: Instructions: Duty of Gripman: Presumptions. Where plaintiff, in plain view (whether seen or not) of the gripman on defendant's eastbound cable car, and unaware of its approach, started to walk diagonally across the tracks at a street crossing while a westbound car also was drawing near, and did in fact cross the north track and get well upon the south track before he was struck and injured by the eastbound car, an instruction was rightly refused which told the jury that even though the gripman saw the plaintiff approaching the track, yet under the law he had the right to assume that plaintiff would stop before he went upon the track, and that the gripman was not required to check or stop the car until there was danger of a collision. *Ib.*



**NEGLIGENCE—Continued.**

27. **Extent of Injuries: Stone Taken from Plaintiff's Face.** Where the extent of plaintiff's injuries was one of the issues in the case, which was tried about two years after the injury complained of, a stone which a witness claimed he took from plaintiff's face immediately after the accident was properly received in evidence. From it the jury could get a more accurate impression of the original extent of the injuries to plaintiff's face. *Ib.*
28. **Damages: Excessive Verdict.** Where a boilermaker 57 years old and in good health, earning over \$100 a month, was struck by defendant's cable car, with the result that his nose was broken, his right forearm broken in two places, his skull fractured, his spinal column injured so that five vertebrae have grown together, and until the time of the trial, two years after the accident, although he "did not look sickly," he had been able to do no work and suffered from partial paralysis of his tongue and of the right side of his face, it is *held* that an award of \$15,000 damages was excessive by \$3000. *Ib.*
29. **Appeal: Credibility of Witnesses: Taking Case from Jury.** The credibility of the witnesses is for the jury, and where in a personal injury action the jury found for plaintiff, whose case was supported by proof, and the court in overruling defendant's motion for a new trial passed upon the weight of the evidence, the defendant cannot upon appeal successfully maintain a contention that the case should have been taken from the jury for failure of proof because, defendant asserts, plaintiff's principal witness showed by his own testimony that he was unworthy of belief. *Ib.*
30. **Starting Engine Suddenly Without Warning: Evidence: Question for Jury.** Plaintiff, a switchman in defendant's employ, had ridden in the cab of a switch engine while it backed westward on track 5 in defendant's yards until it neared a switch connecting that track with track 4, parallel thereto on the north. There the engine stopped, hardly in the clear, while the foreman of the crew walked to a shanty south of the tracks and west of the switch, to report to the yardmaster. On track 4 stood a freight train headed west, with its engine near the switch. As this freight "whistled off," preparatory to pulling out westward, it was discovered that the switch engine was not in the clear, and accordingly the engineer moved it one or two car lengths east of the point of clearance. The freight conductor signaled his train to "come ahead" and it started. About that time plaintiff alighted from the cab of the switch engine and walked westward beside it on the south until he was five or ten feet beyond the tender, where he started to cross the track on his way to the shanty. Meantime the foreman signaled the switch engine to cross the switch ahead of the freight. The engine backed suddenly, and the tender struck the plaintiff just after he stepped upon the track. The engineer and fireman testified that the bell was rung as the engine started, but there was testimony to the contrary. *Held*, that the questions whether plaintiff in so attempting to cross the track failed to use ordinary care, and whether the switch engine was started without warning in such way and under such circumstances as to constitute negligence on defendant's part, were for the jury. *Ostertag v. Railroad.* 457.

## NEGLIGENCE—Continued.

31. ———: ———: **Of Company's Rule: Point not Presented in Instructions.** Where, in an action for injuries to a switchman run down by an engine behind which he attempted to pass, defendant's evidence was that switch engines in the yard were not required to answer signals with the whistle, and testimony was admitted that defendant had a rule requiring two short blasts of the whistle in answer to any signal not otherwise provided for, error, if any, in the admission of the rule was harmless, since the instructions did not submit any fact involving that rule. *Ib.*
32. **Argument of Counsel: Calling Claim Agent a Ghoul.** There was no error in plaintiff's counsel in his argument calling defendant's claim agent a ghoul, when speaking of his having visited the hospital and obtained a statement from plaintiff two days after the accident in which plaintiff had lost a leg. *Ib.*
33. ———: **Improper: Considered in Reducing Verdict.** While the improper argument of plaintiff's counsel is not reversible error in this case, it is taken into consideration in deciding whether or not the verdict is excessive. *Ib.*
34. **Excessive Verdict.** Where plaintiff, 34 years old and in good health, earning \$100 a month as a switchman in defendant's employ, lost his leg by reason of the negligence of defendant's servants, a verdict of \$15,000 is *held* to be excessive by \$5000, especially in view of the fact that plaintiff's counsel used improper argument to the jury. *Ib.*
35. **Semaphore: Purpose.** The system of signals devised to govern the movement of railroad trains, called a "semaphore," consisting in the daytime of oscillating arms or blades elevated above station houses, and in the nighttime of lights displayed therefrom, by which the operator, while at the electric key, can shift the signals so as to indicate to the engineer of an approaching train whether the track is clear or otherwise, was designed to facilitate the movement of trains by requiring a full stop only when an obstruction intervenes, or a stop is necessary for the delivery of orders. Therefore, to accomplish the purpose of a rule declaring that "all trains will approach Cole Junction under full control" two things were primarily necessary on the part of the engineer, namely, to bring his train under full control, and to observe that the signal shone white at night, which white signal indicated that the track was clear and that he was not required to stop for orders. The observance of this rule was paramount to all others; and if the engineer had his train under control and ready to stop until he observed the semaphore showed a white light, and then proceeded, and ran into a train on the track, he was not guilty of negligence; and especially, if in addition to the semaphore notice of a clear track, the initial switch lights were "right." *Finnegan v. Railroad*, 481.
36. ———: **Switch Lights.** A rule that requires trains to "approach the end of double-track junction points prepared to stop unless the switches and signals are right and the track clear" does not mean that the engineer is not authorized to proceed unless the switch lights at the other end of the tracks, pointing away from the train, are right; that would be to give
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## NEGLIGENCE—Continued.

it an absurd construction. If it means the switch lights located at the approach of the junction and those required by another rule in reference to semaphore signals, and the engineer observed both, and both were right, he was not guilty of negligence in proceeding with his train. *Ib.*

37. ———: Go Ahead Rear End Signal: Conflicting With Semaphore Rule: Presumption of Observance. A rule declaring that "no freight train must pass any station or siding at which it is not required to stop, without the enginemen receiving go-ahead signal from rear end," if a requirement in addition to the time card rule authorizing the engineer to proceed when the semaphore signal shone white, was in conflict therewith and may be disregarded; and in the absence of any testimony as to whether or not there was a go-ahead signal, even if the rule is of general application, the presumption is that it was observed. *Ib.*
38. Rules for Operating Trains: Custom. A usage or custom on the part of trainmen may be shown to be at variance with or in modification of a printed rule, when the company, through its proper officers, had knowledge of its violation; and that knowledge need not be shown to have been actual, but may be implied from the notoriety of the custom or inferred from the circumstances which of themselves would imply notice. And hence, where the evidence establishes that it had become the custom of engineers to slow down their trains until they observed a white light in the semaphore, and then to proceed, an engineer cannot be charged with negligence for proceeding after he had seen said white-light signal, even though there be rules requiring him to approach the junction under full control, and prepared to stop unless there are rear-end go-ahead signals. *Ib.*
39. Movement of Trains: Full Control: Evidence of Meaning. The term "full control" as applied to the movement of a train is technical, and while railroad operatives may well understand its meaning, a jury may not, and hence it is competent to show by such operatives that it did not mean a full stop of the train; and if the evidence shows that when the freight train was within twelve or fourteen hundred feet of the junction, which the rules required all trains to approach "under full control," the engineer reduced the speed of the train to twelve or fifteen miles an hour, which would have enabled him to come to a full stop in six or seven hundred feet, and then seeing that the initial switch lights were "right" and that the semaphore light showed white, which was a signal that the track was clear, he increased his speed, it is competent for the court to instruct the jury that, if they find this evidence to be true, the rule as to "full control" was complied with. *Ib.*
40. ———: Expert Testimony: Hauling Train in Usual and Proper Manner. The usual and ordinary manner of operating railroad trains is a subject of expert evidence. It is proper to permit the train dispatcher, who had charge of the movement of trains on the division on which one freight train collided with another, and knew the significance of train orders, signals and switch lights, to testify as to the purpose and meaning of signals, switch lights, dispatches sent, and delivered, and the usual and customary manner of running trains at the

## NEGLIGENCE—Continued.

point of the accident, for the purpose of enabling the court or jury to fully understand the facts in the given case, in order that the appropriate rules of law may be applied thereto. *Ib.*

41. **Instruction: Trains: Meaning of Orders.** The words "orders" and "rules" as applied to the movement of trains are synonymous, and there is no difference in their practical application. An instruction telling the jury that "the orders to the engineer and signals displayed authorized him," etc., is justified by the evidence, if the rules of the company, or their substituted custom, familiar to every operative, authorized the instruction, for such rules and custom had the practical force and effect of an order. *Ib.*
42. **Rules on Time Card: Judicial Notice.** The court will take judicial notice, if the fact does not appear in evidence, that all train operatives carry the current time card of trains, and that the rules printed thereon are ever present with the engineer of a freight train. *Ib.*
43. **Freight Trains: Ruling Signals: Observance and Abandonment.** The ruling signals by which an engineer of a freight train was to be guided in approaching a junction, under a wholesome and common-sense interpretation of the company's rules in this case, are *held* to have been the initial switch lights and the light displayed in the semaphore; and whether or not those paramount rules, and others read in connection therewith, were observed, either by a compliance with their terms or in such a manner as to work their abandonment or abrogation, was a matter for the jury, since there was evidence upon which either theory might have been based. *Ib.*
44. **Verdict: Evidence of Prior Efficiency.** The material issue being the plaintiff's injury, and not his past record, evidence of his efficiency and fidelity throughout a long term of service does not, as a general proposition, help to fix the amount of damages; but where a case presents a flawless trial record, convincing proof of plaintiff's injuries and an absence of evidence of negligence, such evidence is not improper, as supplemental to the main facts; for, it gives moral effect and evidential force to said other facts and thereby assists in determining the amount of damages which should be awarded for the injuries sustained. *Ib.*
45. ———: **Excessive: \$25,000.** Plaintiff, an experienced engineer, thirty-seven years of age, in good health, ran his freight train, without negligence, into another train standing partly on the main track and partly upon the track of a branch road; he was earning \$175 per month, and for eighteen consecutive years he had been in the employ of defendant, half the time as a locomotive engineer, and not a single mark of delinquency mars his record of faithful service; he possessed at all times a cool head, a steady hand and a devotion to a hazardous duty scarcely equalled in the industrial world; as a result of the collision he was rendered unconscious, and covered with muriatic acid, which burned him from the elbows to the finger tips, and from the breast bone to the top of the head; one ear was nearly burned off, his eyes were severely burned, and the ligaments attaching the right pelvic bone to the spine were torn loose, and as a result there has been a distortion or displacement of the entire pelvis; there was curvature of the

## NEGLIGENCE—Continued.

spine, and the pelvic bone has shifted two and a half inches out of its normal place; one leg is an inch shorter than the other; a scar tissue has formed over his eyes, as a result of the acid burns, destroying the vision of one, save as to perception of light, and lessening the visual power of the other to the extent of nine-tenths of that of a normal eye; and he is now unable to pursue any gainful avocation. The jury returned a verdict for \$50,000, and, upon a motion for a new trial, the trial court required a *remittitur* of \$25,000, and that being filed overruled the motion.

*Held*, by WALKER, BROWN and BOND, JJ., that the judgment for \$25,000 is not excessive. *Held*, by LAMM, C. J., that it is excessive, and that it should be reduced to \$15,000 and then affirmed. BROWN, J., concurs in affirmance, and recalls what was said by him upon the former appeal, since what he then said was based upon a misunderstanding of the facts.

*Held*, by WOODSON, J., that the verdict for \$50,000 shows passion and prejudice on the part of the jury; and there being evidence of plaintiff's contributory negligence, that prejudice attaches to the entire verdict, and in consequence the rules for a fair trial require a reversal.

*Held*, by GRAVES, J., with whom FARIS, J., concurs, that for the reasons stated in the opinion of BROWN, J., 244 Mo. 643, and in his own opinion, 244 Mo. 616, on the former appeal, the judgment should be reversed, since the record does not show such a change in the facts as to destroy the legal conclusions there reached.

*Held*, upon *per curiam*, that the parties having, since the opinion was written, filed a stipulation agreeing to a judgment for \$10,000, the judgment is affirmed for that amount. *Id.*

## NEGOTIABLE INSTRUMENTS.

**Taxation: Equity In Hypothecated Notes.** The Lincoln Trust Company of St. Louis, owning \$549,385.56 worth of notes secured by real estate, placed them with the Union Trust Company, as trustee, to secure the payment of \$500,000 first mortgage gold bonds issued by said Lincoln Trust Company. Then said Lincoln Trust Company sold its equity in the notes to defendant for \$49,385.56, just the difference between the amount of the notes and the amount of the bonds they were deposited to secure. *Held*, that defendant was taxable upon \$49,385.56, the value of its equity, and not upon the full value of the notes. *State ex rel. v. Trust Co.*, 448.

## NEW TRIAL.

1. **As to One Defendant: Not as to Other.** The granting of a new trial to one of two defendants, jointly indicted and jointly tried and jointly found guilty by the same general verdict, is not *ipso facto* a granting of a new trial to the other. *State v. Taylor*, 210.
2. **Sufficiency of Evidence: Where It Might Properly Have Been Granted.** Although the Supreme Court may be of the opinion that the trial court, in view of the evidence, should have granted to appellant a new trial, it will not on that ground hold that the trial court committed error if there is substantial evidence of defendant's guilt. The Supreme Court has nothing to do with the credibility of the evidence; its weight

## NEW TRIAL—Continued.

and credibility are for the jury, and if their verdict meets the approval of the trial judge the Supreme Court, although the strange fact that the State's main witness is accused's own sister and the deceased was to her unknown may challenge attention, cannot compel a new trial on the theory that her testimony is contrary to human experience, her testimony being substantial and if true showing defendant's guilt, and bearing the earmarks of verity, and there being no showing of enmity or unfriendliness on her part for accused, and nothing in her manner of testifying or conduct from which either could be inferred. *Ib.*

3. **Special Findings: New Trial.** Where in ejectment the defendant asserted title to land under the thirty-one year Statute of Limitations, and the court found specially that, since he had color of title, said defendant was in "lawful possession," but it appears upon appeal that the evidence does not support the finding of color of title, the case is reversed and remanded for a new trial, in the course of which evidence may be introduced upon the question whether or not defendant's possession was of such character as to be lawful, under the statute, without color of title. *Abeles v. Pillman*, 359.

NONALCOHOLIC DRINKS. See *Constitutional Law*, 2.

## NOTICE.

1. **Purchaser of Swamp Lands.** The Register's Book and Receiver's Book, showing that certain swamp land has been entered and paid for by a certain entryman, if kept in the manner required by the various statutes relating to such lands, are notice to the world that the county has sold the land; and a subsequent purchaser from the county purchases subject to the rights of such former purchaser and his grantees. *Russ v. Sims*, 27.
2. **Vendor and Purchaser: Real Estate: In Possession of Third Party.** He who buys property in the open and visible possession of a third person is chargeable with notice of the title and right of that person in the premises. *Stone v. Railroad*, 61.
3. **—: Foreclosure Deed not Recorded; Purchaser of Equity of Redemption.** A recorded deed of trust is constructive notice that the legal title is outstanding in the trustee, and one who, without notice of the foreclosure of the deed of trust, purchases the equity of redemption ten years after the foreclosure but before the recording of the foreclosure deed, is not entitled, in a suit to quiet title, to have the foreclosure deed declared void, although meanwhile he has completed and operated a railroad upon the land in question. *Ib.*
4. **Payment: Mistake of Law: Public Officer.** A public officer, charged with the collection of public taxes, is not a general agent of the municipality, but only an agent for the purposes defined by law, and of the limitations of his agency the public is bound to take notice. He cannot give away county funds, or disburse them contrary to law, and any payment of them made by him, unless authorized by valid law, even if made under the mistaken and honest belief that the law authorizes it, is not binding upon the municipality, unless the element

**NOTICE—Continued.**

of estoppel or some other inexorable principle of law intervenes to bar the municipality's right to recover back the money so paid. *Lamar Township v. Lamar*, 171.

5. **Taxation: Notice to Property Owner: Defects Waived by Appearance.** Although the notice to a property owner from a board of equalization failed to state, in accordance with Sec. 11407, R. S. 1909, the kind, class, and value of property about to be added to his assessment, but set out rather that the board proposed to increase his assessment, nevertheless any defects in the notice were waived by appearance. *State ex rel. v. Trust Co.*, 448.

**OPTION DEALING.**

1. **Sec. 4781, R. S. 1909: Repeal of Statutes.** Section 4781, R. S. 1909, a part of the law against option dealing enacted in 1889, was not repealed by the enactment in 1907 of Sec. 4776, a part of the bucket-shop law. The sections have distinct offices to perform, and the enactment of the one had no effect upon the other. *State v. Long*, 314.
2. **Sec. 4782, R. S. 1909: Repeal of Statutes.** Section 4782, R. S. 1909, prohibiting the keeping of a place for option dealing, being practically the same as Sec. 3 of the bucket-shop law of 1887, the former superseded the latter, and the express repeal of Sec. 3 in 1903 did not operate as a repeal of Sec. 4782. *Ib.*
3. **Statutes: Constitutional.** Sections 4780, 4781 and 4782, R. S. 1909, prohibiting dealing in options or the keeping of a place for that purpose, are constitutional. *Ib.*

**PARTITION.**

**During Life Estate: Contrary to Will.** Where the will gave land to testator's son and his wife "during their natural lives and at the death of both to be divided equally between all my grandchildren; but should my son die before his wife the real estate is to be divided equally between my grandchildren and said daughter-in-law, share and share alike," the land cannot be partitioned during the lifetime of said son, even on his petition, the word "divided" indicating clearly that it was the testator's will that no sale or other disposition of the property be made during the life of the son. [Refusing to follow *Reinders v. Koppelman*, 68 Mo. 482; *Sikemeier v. Galvin*, 124 Mo. 367; and *Preston v. Brant*, 96 Mo. 552; and following the more recent cases of *Gullick v. Huntley*, 144 Mo. l. c. 246, and *Stewart v. Jones*, 219 Mo. 614.] *Hill v. Hill*, 55.

**PAYMENT.**

1. **Taxes: Mistake of Law: Public Officer.** A public officer, charged with the collection of public taxes, is not a general agent of the municipality, but only an agent for the purposes defined by law, and of the limitations of his agency the public is bound to take notice. He cannot give away county funds, or disburse them contrary to law, and any payment of them made by him, unless authorized by valid law, even if made under the mistaken and honest belief that the law authorizes it, is not binding upon the municipality, unless the element of estoppel or some other inexorable principle of law intervenes

**PAYMENT—Continued.**

to bar the municipality's right to recover back the money so paid. *Lamar Township v. Lamar*, 171.

2. ———: **Paid to City by Mistake of Law.** A payment of road and bridge taxes belonging to a township, collected by a township collector and the county treasurer as *ex officio* county collector, made to the treasurer of the city situated in said township, under the mistaken view that under the law said taxes belonged to the city, is no bar to a recovery by the township of the money so paid. The rule that a payment made in mistake of law cannot be recovered, does not apply to a municipality. [*Distinguishing Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264, and *State ex rel. v. Hawkins*, 169 Mo. 1. c. 618.] *Ib.*

**PLEADING.**

1. **Negligence: Defective Cross-Arm: Designed to Support Line-man.** Although the petition does not categorically aver that the cross-arm upon which plaintiff was resting a part of his weight while attempting to remove a transformer from an electric light pole and to replace it with a larger one, was intended to support his weight while he was performing that work, yet if it alleges that fact with sufficient clearness to notify the defendant company that the rotten condition of the cross-arm was the cause of his falling, defendant, having neglected to demur or to move to make the petition more definite, will not be heard to complain, after verdict, that the petition was insufficient in that respect. *Rutledge v. Swinney*, 128.
2. **Tax Sale: Unknown Heirs.** The petition in a tax sale must describe the interests of the unknown heirs of a deceased owner, otherwise a sale under a judgment rendered thereon is void. After the death of the owner of the land, his heirs must be properly sued, served and allowed their day in court, else their title is not affected by judgment. *Chilton v. Nickey*, 232.
3. **Taxes: Not Pledged: Judgment.** Where defendant's answer made no claim for taxes paid on land bought at an invalid tax sale, but a certain sum was put in evidence, the Supreme Court will render judgment, in a suit to quiet title which went against defendant, for an amount proportionate to the sum paid by defendant upon that part of the land adjudged to belong to the plaintiff. *Ib.*
4. **Breach of Contract: Employment: Indeterminate Term: Termination: Abuse of Discretion.** A petition which charges that the period of plaintiff's employment as a member of a college faculty was indeterminate; that is to say, that it was for a period of one year, with the understanding and agreement that he would be retained at the discretion of the board of trustees beyond said first year without any formal employment or renewal of said contract if his educational work was satisfactory and no personal objection could be urged, and that said board by its articles of association and by-laws could remove after said year any instructor when in the judgment of said board the interest of the college shall require it, and further alleging that said board discharged plaintiff, at the end of the first year, without assigning any other cause



## PLEADING—Continued.

except that in the judgment of the board the interest of the college required that his term of service should close, does not state a cause of action for damages for a breach of contract, unless it contains further allegations showing that the board abused its broad discretion to terminate his employment. *Darrow v. Briggs*, 244.

5. ———: ———: ———: ———: ———: Teaching Theosophy: Newspaper Controversy. A board of trustees of a college, whose charter and by-laws forbid any religious or political test, either in instruction or in the employment of teachers, but authorizing the "board to remove any teacher when the interest of the college shall require it," does not breach its contract by which plaintiff was employed for one year and permanently thereafter "if after said probationary period of one year there is no difficulty," or abuse its discretion, by terminating plaintiff's employment at the end of one year and assigning no other reason than that the interest of the college requires that his term of service should close, where plaintiff has avowed his devotion to the cult called "Theosophy" and has allowed himself to be drawn into heated newspaper controversies with ministers and others in defense thereof—even though he was nagged into such controversy by the intemperate attacks of said ministers. Such dismissal was in the interest of the college, and was not an abuse of the board's discretion. *Ib.*
6. Conspiracy: Petition: Cause of Action. In an action on the case in the nature of a writ of conspiracy, the plaintiff may have judgment against one defendant, although he may have no cause of action against the others. But the action can only be sustained against several defendants where the acts complained of would sustain an action against one of them. An allegation that all defendants conspired together does not authorize the defendant to maintain his action when he could not maintain it against one of them if he were sued alone. A conspiracy of itself furnishes no cause of action, because from the mere forming of it no possible damages can accrue. *Ib.*
7. ———: ———: ———: Libels and Slanders: Breach of Contract. Although the petition contains averments of libels and slanders uttered by one defendant sufficient, if properly pleaded with a proper legal setting, to put him on his defense for actionable utterances, yet if the whole trend of the other allegations is that the other defendants had no part in them, and, not seeking to hold him or the others liable for libel, but, by a charge of conspiracy, seeks to recover damages from the others for a breach of a contract of employment committed by said others, induced thereto by a communication to them of said libels by said defendant, but further charging that said defendant in communicating them to the others acted alone, the petition does not state a cause of action, for a conspiracy resulting in plaintiff's discharge from such employment. *Ib.*
8. Incoherent: Non-Understandable. A petition whose allegations are incoherent and present no understandable issues, is bad on demurrer, since it is still the rule that the pleader is not allowed, by inserting doubtful and uncertain allegations in his pleading, to throw upon his adversary the hazard of correctly interpreting its meaning. *Ib.*

## PLEADING—Continued.

9. **Specific Performance: Allegation of Ownership.** A decree for the specific performance of a contract for the purchase of land will not be reversed because the petition does not contain an allegation in apt terms that defendant was the owner of the land at the time of bringing the suit, where objection to the petition was first made in the motion in arrest, and the case was tried throughout by both parties as if it contained such allegation and defendant testified he was the owner. [Sec. 2119, R. S. 1909.] *Tebeau v. Ridge*, 547.
10. **Liberal Construction.** Allegations of pleading must be liberally construed with a view to substantial justice. *Orthwein v. Insurance Co.*, 650.
11. **Insurance Policies: Lex Loci: Venue: Margin.** A venue laid in the margin of the petition, thus, "In the Circuit Court, City of St. Louis, State of Missouri," will be the venue for all other matters requiring a venue arising from the petition, none special being pleaded. So that, where the petition is grounded on policies issued by an insurance company, alleged to be organized in another State, but authorized to do business in this State, it will not be *held*, in adjudging its sufficiency to state a cause of action, upon a demurrer thereto, that it is silent as to where the policies were executed or delivered, in that it contains no allegations showing they were governed by the laws of this State; for, if it alleges that the company was authorized to do business in this State at all times mentioned in the petition, that it did business by issuing the policies sued on on a given date, whereby it agreed to do certain things, and that plaintiff paid certain premiums and made certain demands of the company which he seeks to have enforced, those allegations, taken with the venue stated in the margin, are sufficient to authorize a holding that the policies are governed by the laws of this State and the contract is to be construed according to its statutes. *Ib.*
12. ———: ———: **Material Error: Must Be Believed to Exist.** Error, to be reversible, must be material, and the court must believe it material. So that, where defendants demurred to plaintiff's petition, charging it did not state a cause of action, and their demurrer being overruled appealed, the appellate court cannot reverse the trial court's ruling on the theory that it cannot be determined from the petition whether it is a contract under the laws of this State, if it must guess (1) as to whether it states a contract made and delivered in this State or (2) if made and executed in another State whether the law thereof is the same as Missouri's. *Ib.*
13. ———: ———: **Venue: Impliedly Admitted by Demurrer.** A demurrer to plaintiff's petition by necessary implication admits the insurance policies sued on are governed by the laws of this State, if it charges specifically, by way of confession and avoidance, (1) that a named statute does not apply to the facts and (2) that, if held to apply, it must be brushed aside as unconstitutional. *Ib.*

## PRACTICE.

1. **Evidence: Sufficiency: Demurrer.** In passing upon the sufficiency of the evidence, when challenged by demurrer, the general rule is that plaintiff's evidence (if not impossible

## PRACTICE—Continued.

or opposed to the physics of the case or entirely beyond reason) is taken as true and plaintiff is further entitled to the benefit of every reasonable inference of fact arising on all the proof. But this does not relieve plaintiff from the necessity of producing substantial testimony to prove the issues involved. A mere glimmer or spark, a mere scintilla, will not do. *Near v. Railroad*, 80.

2. **Voir Dire: Attorney for Casualty Company: Not Record Party.** Where an attorney for a casualty company was in court ostensibly as counsel for the defendant, and making a defense which was really in behalf of his company, not a record party to the suit, it was not improper for plaintiff's counsel to ask jurors on their *voir dire* if they were connected in a business way with the casualty company. *Kinney v. Railroad*, 97.
3. **Receiver: Fitness: Motion to Vacate: Supported by Affidavits.** Where there is no competent proof of the bias or partiality or other unfitness of the person appointed a receiver, the defendant's motion to vacate the order appointing him on the ground that he is prejudiced and hostile to defendant, should be overruled, although the proof heard on the motion was in the form of affidavits, and whether or not that was the correct method of proof where both sides resorted to it. *Abramsky v. Abramsky*, 117.
4. **Defendant's Failure to Testify: Refusal of Instruction Not to Consider.** It is not reversible error to refuse an instruction asked by defendant to the effect that the jury are not to consider as any evidence of his guilt or innocence the failure of defendant to testify in his own behalf. [Following *State v. Robinson*, 117 Mo 649.] Neither is it error for the trial court to give such an instruction. [Citing *State v. DeWitt*, 186 Mo. 61.] And it would perhaps be a little fairer to defendant to give such an instruction, if he asks it; but in view of the dark and muddy language of Sec. 5243, R. S. 1909, and the holding in the *Robinson* case, it cannot be held to be reversible error not to give it. *State v. Taylor*, 210.
5. **New Trial: As to One Defendant: Not as to Other.** The granting of a new trial to one of two defendants, jointly indicted and jointly tried and jointly found guilty by the same general verdict, is not *ipso facto* a granting of a new trial to the other. *Ib.*
6. **Suit to Quiet Title: Legal Title: Adverse Possession: Issue of Law: Verdict.** Where in a suit to quiet title the plaintiff stood on his legal title and the defendant claimed under the thirty-year Statute of Limitations, a square issue of law resulted, and the verdict of the trial court on that issue is conclusive. *Chilton v. Nickey*, 232.
7. ———: ———: ———: **Preponderance of the Evidence.** One claiming under the thirty-year Statute of Limitations must establish his possession by a preponderance of the evidence. *Ib.*
8. **Rules on Time Card: Judicial Notice.** The court will take judicial notice, if the fact does not appear in evidence, that all train operatives carry the current time card of trains, and that the rules printed thereon are ever present with the engineer of a freight train. *Finnegan v. Railroad*, 481.

## PRACTICE—Continued.

9. **Freight Trains: Ruling Signals: Observance and Abandonment.** The ruling signals by which an engineer of a freight train was to be guided in approaching a junction, under a wholesome and common-sense interpretation of the company's rules in this case, are *held* to have been the initial switch lights and the light displayed in the semaphore; and whether or not those paramount rules, and others read in connection therewith, were observed, either by a compliance with their terms or in such a manner as to work their abandonment or abrogation, was a matter for the jury, since there was evidence upon which either theory might have been based. *Ib.*
10. **Equity: Finding of Facts Not Pleaded.** In a broad sense an equity suit is to be tried *de novo* on appeal; and though the chancellor may have made findings outside both pleadings and proof, yet the judgment will be affirmed if there is enough in the pleadings and proof to fully uphold the decrees. *Tebeau v. Ridge*, 547.
11. **Will Contest: Careful Consideration of Evidence.** Courts give careful consideration to the evidence in cases contesting the validity of wills, to the end that it may be seen that there is substantial testimony upon the issues of either mental incapacity or undue influence; and especially, to the testimony concerning incapacity, for the reason that opinions of lay witnesses often furnish the basis for the verdict. *Major v. Kidd*, 607.
12. ———: **Law Case.** A will contest is a trial of issues of law, and is governed by the rules of law applicable to legal actions. *Ib.*
13. ———: ———: **Incapacity: Substantial Evidence.** If there is substantial evidence tending to support the charge of testator's mental incapacity to make the will in contest, the verdict of the jury, the instructions being proper, is binding upon the appellate court. *Ib.*
14. ———: ———: ———: ———: **Contestants' Testimony.** If the evidence adduced by contestants upon the issue of testator's mental incapacity is substantial, the issue then becomes a matter for the jury, notwithstanding the contradictory proof produced by proponents. *Ib.*
15. ———: **Sound Mind: Burden of Proof.** The burden is upon the proponents of the will to show that testator was of sound mind. It is not error to instruct the jury that the burden rests upon the proponents to prove, by the greater weight of the credible evidence, that testator, at the time of making the will, possessed a sound disposing mind. The burden is not met by making out a *prima-facie* case, but remains upon proponents throughout the trial. [Following *Goodfellow v. Shannon*, 197 Mo. 1. c. 278, *et seq.*, and reviewing all the cases.] *Ib.*

## PRESUMPTIONS.

**Specific Performance: Inference of Fact: Deference to Chancellor.** Inferences in their last analysis are but presumptions of a milder sort, and presumptions of fact fly away upon the entrance of proof. Where plaintiff swore that he did not know that defendant had a wife at the time the contract of lease with an

**PRESUMPTIONS—Continued.**

option to purchase was entered into, and on the other side there are facts from which it could reasonably be inferred that if plaintiff did not know that defendant was married at that time he ought to have known it, the appellate court will defer to the finding of the chancellor on the point. *Tebeau v. Ridge*, 547.

**PROFESSOR IN COLLEGE.** See *Contracts*.

**PUBLIC MONEY, APPROPRIATION.** See *Schools*.

**PUBLIC SCHOOLS.** See *Schools*.

**QUIETING TITLE.**

1. **Common Source.** In a suit to quiet title, where all parties claim under a common source, it is of no consequence whether such common source was the owner of the legal or of a mere equitable title. *Russ v. Sims*, 27.
2. **Common Source of Title: Possession Under Erroneous Description.** It is not necessary, to constitute a common source of title, that both parties should have a good title from the common source. That would be impossible. All that is necessary is that both parties claim under the common source. So where one of defendant's predecessors in title took possession of a right of way under a deed from the owner of the land under whom plaintiff claims, which deed misdescribed one of the lots over which the grant was made, that makes a common source of title which cannot be impeached by defendant except by showing a title superior to that of the common source. *Stone v. Railroad*, 61.
3. **Evidence: Deed: Made by Order of Court.** In a suit to quiet title a joint deed to the property in dispute made by the owner's assignee in bankruptcy and by a substituted trustee under a deed of trust, was properly admitted in evidence, over an objection that the power of the makers was not shown, where the deed recites that the land was sold under an order of the court in bankruptcy and under the provisions of the deed of trust. *Ib.*
4. **Tax Sale: Unknown Heirs.** The petition in a tax sale must describe the interests of the unknown heirs of a deceased owner, otherwise a sale under a judgment rendered thereon is void. After the death of the owner of the land, his heirs must be properly sued, served and allowed their day in court, else their title is not affected by judgment. *Chilton v. Nickey*, 232.
5. **Legal Title: Adverse Possession: Issue of Law: Verdict.** Where in a suit to quiet title the plaintiff stood on his legal title and the defendant claimed under the thirty-year Statute of Limitations, a square issue of law resulted, and the verdict of the trial court on that issue is conclusive. *Ib.*
6. ———: ———: **Preponderance of the Evidence.** One claiming under the thirty-year Statute of Limitations must establish his possession by a preponderance of the evidence. *Ib.*
7. **Ownership in Others than Parties.** Where the evidence in a suit to quiet title shows that a portion of the land in suit did

**QUIETING TITLE—Continued.**

not, when the suit was instituted, belong either to plaintiff or to defendant, there can be no adjudication as to that portion. *Ib.*

8. **Taxes: Not Pledged: Judgment.** Where defendant's answer made no claim for taxes paid on land bought at an invalid tax sale, but a certain sum was put in evidence, the Supreme Court will render judgment, in a suit to quiet title which went against defendant, for an amount proportionate to the sum paid by defendant upon that part of the land adjudged to belong to the plaintiff. *Ib.*

**RECEIVERS.**

1. **Appeal: Appointment of Receiver: Demurrer to Petition.** No appeal lies in the middle of a case, for instance, from a holding that a petition praying for the appointment of a receiver is good on demurrer, without final judgment; but an appeal from the overruling of a motion to revoke an order appointing a receiver, filed after a demurrer to the petition was overruled, asking that said order be revoked, for the reason, among others, that the petition did not state facts sufficient to constitute a cause of action, incidentally involves the sufficiency of the petition, since, if the petition states no cause of action, there was no basis for the court's action in appointing the receiver, and appellant's motion to vacate the order should have been sustained. *Abramsky v. Abramsky*, 117.
2. **Fitness: Motion to Vacate: Supported by Affidavits.** Where there is no competent proof of the bias or partiality or other unfitness of the person appointed a receiver, the defendant's motion to vacate the order appointing him on the ground that he is prejudiced and hostile to defendant, should be overruled, although the proof heard on the motion was in the form of affidavits, and whether or not that was the correct method of proof where both sides resorted to it. *Ib.*
3. **Appointment: Discretion of Court.** Sec. 2018, R. S. 1909, saying that a circuit court may appoint a receiver "whenever such appointment shall be deemed necessary," vests in the judge a discretion so broad as to be a matter of review on appeal only in case of palpable abuse thereof. *Ib.*
4. **Husband and Wife: Suit by One Against Other.** The husband may sue the wife either at law or in equity, the same as if she were a *feme sole*, for instance, he may bring suit for the appointment of a receiver to take charge of and administer real estate conveyed to both as an estate by the entirety. *Ib.*
5. **—: Appointment: Estate by the Entirety.** Where lots were conveyed to a husband and wife, thereby creating an estate by the entirety, and a mortgage was placed thereon by them to secure the payment of money borrowed for the construction of a building thereon, and the wife has ousted the husband from all control of the property and has collected and appropriated the rents, and failed and refused to apply any of the rents to the payment of the debt, and proceedings for foreclosure of the mortgage have been begun, the circuit court has power, upon the husband's suit against the wife alone, to compel an accounting, and to appoint a receiver to take charge of the

**RECEIVERS—Continued.**

property and rent the same and collect the rents; and if there is nothing in the facts to indicate that the court has abused its sound discretion, a motion to revoke the order appointing the receiver will not be sustained on appeal. *Abramsky v. Abramsky*, 117.

**RECORDING DEEDS.** See *Conveyances*.

**REMARKS OF COUNSEL.** See *Attorneys*.

**RES JUDICATA.**

**Actions: Parties: Bound by Prior Adjudication.** As regards the subject-matter, parties to a prior suit and their privies are concluded, in a second suit, as to all matters which were or might have been submitted to the court for its consideration on the issues in the first case. *Stone v. Railroad*, 61.

**SACCHARIN.** See *Constitutional Law*, 2.

**SALES.**

1. **Necessary Elements.** The sale of personal property is a transfer of the absolute or general property in the thing for a price in money. To constitute a valid sale there must be a concurrence of certain essential elements: First, parties capable of contracting, a seller and a buyer, either of whom may be an artificial person having a legal existence or a natural person, and, although such natural person may buy from said artificial person and be enabled to so buy only because he is a member thereof, yet he is still a natural person, because he has no such individualized ownership in the concrete property of the corporation as will enable him to legally appropriate it except by purchase; second, mutual consent, that is, a power and a purpose to sell by the seller, and a willingness to buy on the part of the purchaser; third, a thing being sold, the absolute or general property in which is capable of being transferred and is transferred from the seller to the buyer; and, fourth, a price paid or promised for such thing. *State ex inf. v. Athletic Club*, 576.
2. **Intoxicating Liquors: By Club to Members.** The supply of intoxicating liquors by an incorporated club to its members, within the club building, for a definite price to be paid, is a sale of such liquors, although the club does not sell to any one except members, and does not permit them to pay for same at the time they are ordered or used, but requires the members to sign cards at the time the liquors are received, acknowledging the receipt and stating the price, and to pay for same at the end of the month when all supplies are paid for, and the money is commingled with other funds of the club and used in replenishing its stock of liquors and purchasing other supplies for the use of members. Nor is such transaction rendered any the less a sale by the fact that the liquor is supplied only to members of the corporation, since the corporation or club is one person, and no member or stockholder has any such individualized interest therein as authorizes him to appropriate any part of its assets without paying for them. *Ib.*
3. **———: ———: Corporation.** An incorporated social club is a person within the meaning of the corporation laws, and the dispensing of liquors by it to its members for agreed sums of money, although not for profit, is a sale. [To that extent overruling *Bell v. St. Louis Club*, 125 Mo. 308.] *Ib.*

## SCHOOLS.

1. **Constitutional Law: Title: Consolidated School Districts.** The title of an act which is, "An act to provide for the organization of consolidated schools and rural high schools and to provide State-aid for such schools," does not contain two subjects, and does not violate section 28 of article 4 of the Constitution. It but deals with two phases of the same subject, namely, the organization of school districts and State-aid thereto, but in its entirety relates to but one subject. State ex rel. v. Gordon, 631.
2. ———: **State-Aid: Appropriation: Aided by Other Acts.** An act which attempts to grant State-aid to consolidated schools and rural high schools and provides that, when certain conditions have been complied with, certain sums of money shall be paid to the district out of the State Treasury, and that the State "shall make adequate appropriations for carrying out" said provisions, must be read in connection with the biennial school appropriation bill; and if, when that is done, both together constitute a "regular appropriation made by law," the act will not be held to be violative of section 43 of article 4 of the Constitution. Ib.
3. ———: ———: **Grant of Public Money.** The clause of the Constitution (Sec. 46, art. 4) that prohibits the Legislature from making any grant of public money "to any individuals, municipal or other corporation," does not have any reference to corporations belonging wholly to the State, and does not prohibit the grant of State aid to consolidated schools or rural high schools. Ib.
4. ———: ———: ———: **Ordinary School Moneys.** Sections 2 and 6 of article 4 of the Constitution are applicable to the ordinary school funds to be distributed to the ordinary public schools, and not to those funds which the State may specially appropriate to other schools. Ib.
5. ———: ———: **General Revenue: Any Public Purpose.** General revenue, collected by the State, by taxation, from all parts thereof, is not the private property of any county or school district, but is the property of the State, and may be appropriated and used for any governmental purpose which the Legislature deems wise; for instance, it may be used in aid of the establishment and maintenance of consolidated schools or rural schools, whose organization the Legislature has authorized. Ib.
6. **Consolidated Schools: Power to Issue Bonds: Found in Other Acts.** The act of 1913 providing for the organization of consolidated school districts for elementary and high schools does not in so many words authorize such a district to issue bonds; but the act deals with the general subject of public education, and should be considered a part of the general school laws pertaining to schools of their class, such as Sec. 10777, R. S. 1909, and when that is done such districts have authority to issue bonds for the purposes authorized by those general laws. Ib.

SOCIAL CLUBS. See Intoxicating Liquors.



## SPECIFIC PERFORMANCE.

1. **Parol Evidence: Statute of Frauds.** Specific performance is refused where there is no description, in letters and memoranda, to satisfy the Statute of Frauds, other than "land south of the Missouri Pacific Railroad tracks," and "forty-some-odd acres of bottom land you have adjoining us [plaintiff] at Sherman, Missouri." Parol evidence, when admitted to disclose the situation of the parties when the writings were made shows only that defendant did own land adjoining a tract of plaintiff's, but not necessarily situated at Sherman, and, even though the evidence had shown such location, it appears that defendant's tract contained 72.95 acres, and it would be impossible to ascertain from the memorandum what portion should be taken to compose the forty-odd acres mentioned. *Cement Co. v. Kreis*, 160.
2. **Sale by Heirs: One Heir Willing to Sell.** Evidence showing merely that one of several heirs was conducting negotiations looking to a sale of land held in common, and was willing that it should be sold if the others agreed, does not warrant a decree of specific performance for his share. *Barthel v. Engle*, 307.
3. **Inference of Fact: Deference to Chancellor.** Inferences in their last analysis are but presumptions of a milder sort, and presumptions of fact fly away upon the entrance of proof. Where plaintiff swore that he did not know that defendant had a wife at the time the contract of lease with an option to purchase was entered into, and on the other side there are facts from which it could reasonably be inferred that if plaintiff did not know that defendant was married at that time he ought to have known it, the appellate court will defer to the finding of the chancellor on the point. *Tebeau v. Ridge*, 547.
4. **Allegation of Ownership.** A decree for the specific performance of a contract for the purchase of land will not be reversed because the petition does not contain an allegation in apt terms that defendant was the owner of the land at the time of bringing the suit, where objection to the petition was first made in the motion in arrest, and the case was tried throughout by both parties as if it contained such allegation and defendant testified he was the owner. [Sec. 2119, R. S. 1909.] *Ib.*
5. **Lease: Consideration for Option to Purchase.** When a lease of land for a period of years contains an option to the lessee to purchase at any time during the period at stipulated prices, the payment of the stipulated rent reserved is a sufficient consideration to support the agreement to convey, and such option is a continuing offer to sell at the price named up to the end of the period. And though such option agreement may not with precision dovetail into the lease contract, yet being a part of the same instrument and having been written by the lessor and signed by both, it will be considered an integral part of the contract. *Ib.*
6. **Equity: Evidence: Finding of Facts Not Pledged.** In a broad sense an equity suit is to be tried *de novo* on appeal; and though the chancellor may have made findings outside both pleadings and proof, yet the judgment will be affirmed if there is enough in the pleadings and proof to fully uphold the decree. *Ib.*
7. **Wife's Dower: Diminution.** Where the vendee, under a contract for the sale of the land signed by the vendor alone, is entitled to specific performance, there should be a diminution

**SPECIFIC PERFORMANCE—Continued.**

of the purchase price named in the contract by the present value of the wife's inchoate dower, estimated by the tables of mortality and by the statutes of present values of estates less than a fee. In other words, the contract being for the sale of the property for a named price, and that contract being one which, under the evidence, equity, in the exercise of a sound judicial discretion, should enforce, the vendor should not receive the whole purchase price, and then as a reward for his breach of contract be permitted to keep one-third of the title in a life estate in his family, but the value of that inchoate dower should be calculated in the manner prescribed by statute and deducted from the purchase price agreed upon, and then the title be decreed to be, upon payment of the balance, in the vendee, subject to the wife's inchoate dower. [Overruling *Alple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671.] Ib.

8. ———: ———: **Knowledge That Vendor was Married, etc.** The facts that the vendee at the time that the contract of purchase was signed by the vendor alone did not know that he had a wife; and that the vendor, prior to his refusal to convey the land to the vendee according to the contract, had not requested, and did not intend to request, his wife to sign the deed of conveyance, do not in anywise affect the interest of the wife in the land, nor authorize the court to compel her to convey her dower therein, nor do they preclude the court from decreeing specific performance by a diminution from the purchase price of the value of her inchoate dower. They only go to matters of good faith, as such may affect the vendor or vendee. Ib.

**STATE AID TO SCHOOLS.** See *Schools*.

**STATUTE OF FRAUDS.**

**Specific Performance: Parol Evidence.** Specific performance is refused where there is no description, in letters and memoranda, to satisfy the Statute of Frauds, other than "land south of the Missouri Pacific Railroad tracks," and "forty-some-odd acres of bottom land you have adjoining us [plaintiff] at Sherman, Missouri." Parol evidence, when admitted to disclose the situation of the parties when the writings were made shows only that defendant did own land adjoining a tract of plaintiff's, but not necessarily situated at Sherman, and, even though the evidence had shown such location, it appears that defendant's tract contained 72.95 acres, and it would be impossible to ascertain from the memorandum what portion should be taken to compose the forty-odd acres mentioned. *Cement Co. v. Kreiss*, 160.

**STATUTES AND STATUTORY CONSTRUCTION.**

1. **Receiver: Appointment: Discretion of Court.** Sec. 2018, R. S. 1909, saying that a circuit court may appoint a receiver "when-ever such appointment shall be deemed necessary," vests in the judge a discretion so broad as to be a matter of review on appeal only in case of palpable abuse thereon. *Abramsky v. Abramsky*, 117.
2. **Road and Bridge Taxes: Collected by Township: Division with City.** The amendment of 1908 to section 22 of article 10 of the Constitution gave to township boards in counties having town-  
261Mo.52

## STATUTES AND STATUTORY CONSTRUCTION—Continued.

ship organization the right to levy a tax of twenty-five cents on the hundred dollars' valuation for road and bridge purposes, to be used for no other purpose; and the Legislature has no authority to enact a statute taking from the township any part of the tax so collected, and any statute that authorizes a division of said taxes with a city situate within the township would be unconstitutional; and Sec. 11767, R. S. 1909, authorizing such division, is unconstitutional. *Lamar Township v. Lamar*, 171.

3. **Nonalcoholic Drinks: Adulteration: Saccharin: Constitutional Question.** The statute (Laws 1911, p. 261) prohibiting the making or selling of nonalcoholic drinks adulterated with saccharin is unconstitutional. Whether saccharin is deleterious to health or not, it is an arbitrary discrimination to prohibit its use in nonalcoholic drinks and not in other foods and drinks. If the Legislature intended to prevent the use of saccharin in nonalcoholic drinks, not because it is deleterious, but because it sweetens, then there is an arbitrary discrimination in favor of those who sweeten such drinks with sugar. If the Legislature regarded saccharin as deleterious to health, it should have excluded it from all foods and drinks, and not merely from nonalcoholic drinks. If the purpose was merely to prevent the sweetening of nonalcoholic drinks, it should have prohibited the use of any kind of sweetening in such drinks. *State v. Bottling Co.*, 300.
4. **Dealing in Options: Sec. 4781, R. S. 1909: Repeal of Statutes.** Section 4781, R. S. 1909, a part of the law against option dealing enacted in 1889, was not repealed by the enactment in 1907 of Sec. 4776, a part of the bucket-shop law. The sections have distinct offices to perform, and the enactment of the one had no effect upon the other. *State v. Long*, 314.
5. ———: **Sec. 4782, R. S. 1909: Repeal of Statutes.** Section 4782, R. S. 1909, prohibiting the keeping of a place for option dealing, being practically the same as Sec. 3 of the bucket-shop law of 1887, the former superseded the latter, and the express repeal of Sec. 3 in 1903 did not operate as a repeal of Sec. 4782. *Ib.*
6. ———: **Statutes: Constitutional.** Sections 4780, 4781 and 4782, R. S. 1909, prohibiting dealing in options or the keeping of a place for that purpose, are constitutional. *Ib.*
7. **Board of Equalization in City of St. Louis: Power to Add Omitted Property.** By the Act of 1903 (R. S. 1909, sec. 11407), county boards of equalization were given the power to add omitted property to the assessment, and accordingly, by virtue of Sec. 3, p. 2562, R. S. 1899, which provides that all laws requiring a county officer to perform any duty shall include the corresponding officer of the city of St. Louis, the St. Louis board of equalization has like power to add omitted property. *State ex rel. v. Trust Co.*, 448.
8. **Repealing Statute Unconstitutional.** If an ostensible statute attempting to repeal certain sections of the Revised Statutes is unconstitutional and void, those sections, upon an adjudication that said repealing statute is void, are left in existence as live law. *State ex rel. v. Drabelle*, 515.
9. **Former Construction of Statute.** A judicial construction of the statutes by the highest court of the State to the effect that a

## STATUTES AND STATUTORY CONSTRUCTION—Continued.

corporation possessed certain implied powers becomes a part of such statutes only in case such construction affects contract or property rights. The right to sell intoxicating liquor is a mere privilege or governmental grant, and does not involve either contract or property rights, hence, the former holding of the Supreme Court, in *Bell v. St. Louis Club*, 125 Mo. 308, that the dispensing of liquor at retail by a social club to its members was not a violation of the dramshop law, cannot be held to have conferred on said club a vested right to continue such sale. *State ex inf. v. Athletic Club*, 576.

10. **Intoxicating Liquors: No License: Statute.** In view of the statute (Sec. 7188, R. S. 1909) declaring that "no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop-keeper," it is unlawful for an incorporated social or athletic club, without first obtaining a license as a dramshop-keeper, to dispense liquors to its members at a price paid or to be paid, whether for profit or otherwise. *Ib.*
11. **Sale: Interpretation of Statutes.** Laws relating to the sale of intoxicating liquors ought to be so construed as to carry out the true purpose of their enactment, and in accomplishing this purpose they should be liberally construed. While the statute should not be enlarged, it should be interpreted, where its language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained. *Ib.*
12. **Will Contest: Incapacity: Statute.** Because of the wording of the statute (Sec. 535, R. S. 1909) declaring that "every male person, twenty-one years of age and upward, of sound mind, may, by last will, devise all his estate," etc., the question of mental capacity of testator is in all will cases. The burden of proving the testator's mental capacity is by said statute placed upon the proponents, not only in the probate court, but in the circuit court, for a will contest is but the probating or rejection of the will. *Major v. Kidd*, 607.
13. **Consolidated Schools: Power to Issue Bonds: Found In Other Acts.** The Act of 1913 providing for the organization of consolidated school districts for elementary and high schools does not in so many words authorize such a district to issue bonds; but the act deals with the general subject of public education, and should be considered a part of the general school laws pertaining to schools of their class, such as Sec. 10777, R. S. 1909, and when that is done such districts have authority to issue bonds for the purposes authorized by those general laws. *State ex rel. v. Gordon*, 631.
14. **Unambiguous.** A plain and unambiguous statute stands on its own reason, and when it is plain and unambiguous courts are not allowed to vary, enlarge or reduce it, or read into it any exceptions or restrictions, or seek for any fanciful public hurts its enforcement may induce, because of speculative theories of their own or apprehension of others. *Orthwein v. Ins. Co.*, 650.
15. **Insurance Policy: Wife as Beneficiary: Change: Divorce for Husband's Fault.** Sec. 6944, R. S. 1909, authorizing the hus-

## STATUTES AND STATUTORY CONSTRUCTION—Continued.

band to designate another beneficiary in a life insurance policy, issued on his life for the benefit of his wife and paid for by him alone, "in the event of the death or divorcement of the wife before the decease of the husband," entitled him to designate another beneficiary whether he or she was found to be the injured party in the suit for divorce, and whether it was brought by him or her. The right is vouchsafed to the husband without regard as to who was adjudged to be at fault in the divorce proceeding, and the statute violates no vested right of the wife, and is constitutional. *Orthwein v. Ins. Co.*, 650.

16. ———: ———: ———: ———. The word "divorcement" used in the statute, means "divorce," and does not imply affirmative action by the husband alone. No other significance is to be given it. Even if it be true that in a Biblical sense the word "divorcement" primarily implied affirmative action by the husband, that fact would have no tendency to prove the word was used in a Biblical sense by the General Assembly when inserted in section 6944. *Ib.*

## STATUTES CITED AND CONSTRUED.

## United States Statutes

- 33 Stat. at Large, p. 189, see page 242.  
 11 Stat. at Large, p. 251, see page 35.  
 9 Stat. at Large, p. 519, see page 33.

## Revised Statutes 1909

- |         |                                     |   |
|---------|-------------------------------------|---|
| Section | 180, see page 686.                  | 5115, see page 706.                           |
|         | 349, 351, see page 574.             | 5231, see page 226.                           |
|         | 535, 536, see pages 626, 627.       | 5243, see page 227.                           |
|         | 551, see page 627.                  | 5252, see page 225.                           |
|         | 1104, see page 455.                 | 5254, see page 225.                           |
|         | 1124, see page 452.                 | 5891-5893-5900, see pages 518, 525, 524, 527. |
|         | 1785, see page 705.                 | 6293, see page 242.                           |
|         | 1794, see page 278.                 | 6941-6942-6943, see page 667.                 |
|         | 1800, see page 278.                 | 6944, see pages 660, 664, 667, 671.           |
|         | 1823, see page 662.                 | 7188, see pages 590, 601.                     |
|         | 1831, see page 662.                 | 7191, see page 602.                           |
|         | 1850, see page 611.                 | 7222, see page 590.                           |
|         | 1882, see page 376.                 | 7226, see pages 585, 586, 587, 606.           |
|         | 1884, see pages 371, 373.           | 7903, see page 182.                           |
|         | 2018, see page 125.                 | 8304, see page 126.                           |
|         | 2082, see pages 511, 561, 663.      | 10777, see pages 634, 647.                    |
|         | 2084, see page 143.                 | 10839-10840, see page 638.                    |
|         | 2119, see page 560.                 | 10865, see page 636.                          |
|         | 2344, see pages 689, 694.           | 10882, see page 637.                          |
|         | 2535, see page 31.                  | 11407, see page 455.                          |
|         | 2569, see page 58.                  | 11767, see pages 181, 182, 183.               |
|         | 2783, see page 169.                 | 11920, see page 75.                           |
|         | 2867, see page 438.                 | ch. 33, art. 10, see pages 586, 600.          |
|         | 3435, see pages 600, 602.           |   |
|         | 3880, see page 705.                 |   |
|         | 4772-4788, see pages 316, 317, 318. |   |

## STATUTES CITED AND CONSTRUED—Continued.

## Revised Statutes 1899

- 416, see page 684.  
650, see page 31.  
7895, see page 667.
- 8299-8306, see page 646.  
Sec. 3, art. 25, p. 2562, see page 454.

## Revised Statutes 1889

- 2113, see page 560.  
5854, see page 667.  
8952, see page 705.

## Revised Statutes 1879

- 2380, see page 54.  
6838, see page 54.

## Wagner's Statutes 1872

- ch. 37, art. 8, see page 251.

## Revised Statutes 1855

- p. 223, see page 629.  
p. 1005, see page 43.  
secs. 1-2, pp. 1554-5, see page 75.

## Laws 1913

- p. 327, see pages 518, 526, 528.  
p. 328, see pages 526, 528.  
pp. 721-725, see pages, 634, 635, 636, 637, 638 641, 642, 646.

## Laws 1911

- p. 261, see page 302.

## Laws 1907

- p. 271, see page 52.

## Laws 1901

- p. 251, see page 52.

## Laws 1897

- p. 218, see page 182.

## Laws 1872

- p. 67, sec. 1, see page 75.

## Laws 1869

- p. 66, see pages 47, 49, 50.

## Laws 1868

- p. 68, see pages 47, 49, 50.

## Laws (Adj.) 1857

- p. 269, see page 44.

## Laws 1857

- p. 32, see page 46.

**STATUTES CITED AND CONSTRUED—Continued.****Laws 1856-7**

p. 271, see page 43.

**Laws 1856**

p. 271, see page 48.  
p. 464, see page 51.  
p. 473, see page 42.

**Laws 1855**

p. 351, see page 43.  
p. 534, see page 35.

**Laws 1854-5**

p. 154, see pages 40, 49.  
p. 160, see pages 39, 49.

**Laws 1852-3**

p. 108, see page 38.

**Laws 1851**

p. 190, see page 36.  
p. 232, see page 36.  
p. 238, see page 37.

**TAXES AND TAXATION.**

1. **Swamp Lands: Tax Sult: After Sale by Owner.** A judgment for taxes against the original equitable owner of swamp land and a sale thereunder, begun and made long after he had by recorded deed conveyed the land to another, conveyed no title to the purchaser at the tax sale. *Russ v. Sims*, 27.
2. **———: Tax Sale: At No Term of Court.** The Supreme Court takes judicial notice of the terms of the circuit court, and knows that the terms of said court in Pemiscot county in 1879 began on the "second Monday of March and September," and therefore a tax deed reciting that the land was sold "at the November term, 1879, of said court" is void on its face. *Ib.*
3. **Void Levy: Raised by Recipient.** In a suit by a township to recover the amount of road and bridge taxes collected by the township collector and county treasurer as *ex officio* county collector and paid to the city situate within the township, in the honest belief that such taxes belonged to the city, a defense set up by the city that the levies under which the taxes were collected were void, should be stricken out, on motion. The city cannot justify its rights to hold money collected as taxes, on the theory that the levy under which they were collected was void. *Lamar Township v. Lamar*, 171.
4. **To Whom Taxes Belong: Depends on Law.** To whom public taxes belong and the disposition that can lawfully be made of them, depends on the law, and not upon any idea of fairness. *Ib.*
5. **Road and Bridge Taxes: Collected by Township: Division with City.** The amendment of 1908 to section 22 of article 10 of the Constitution gave to township boards in counties hav-

## TAXES AND TAXATION—Continued.

ing township organization the right to levy a tax of twenty-five cents on the hundred dollars' valuation for road and bridge purposes, to be used for no other purpose; and the Legislature has no authority to enact a statute taking from the township any part of the tax so collected, and any statute that authorizes a division of said taxes with a city situate within the township would be unconstitutional; and Sec. 11767, R. S. 1909, authorizing such division, is unconstitutional. *Ib.*

6. **Paid to City by Mistake of Law.** A payment of road and bridge taxes belonging to a township, collected by a township collector and the county treasurer as *ex officio* county collector, made to the treasurer of the city situated in said township, under the mistaken view that under the law said taxes belonged to the city, is no bar to a recovery by the township of the money so paid. The rule that a payment made in mistake of law cannot be recovered, does not apply to a municipality. [Distinguishing *Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264, and *State ex rel. v. Hawkins*, 169 Mo. l. c. 618.] *Ib.*
7. **Payment: Mistake of Law: Public Officer.** A public officer, charged with the collection of public taxes, is not a general agent of the municipality, but only an agent for the purposes defined by law, and of the limitations of his agency the public is bound to take notice. He cannot give away county funds, or disburse them contrary to law, and any payment of them made by him, unless authorized by valid law, even if made under the mistaken and honest belief that the law authorizes it, is not binding upon the municipality, unless the element of estoppel or some other inexorable principle of law intervenes to bar the municipality's right to recover back the money so paid. *Ib.*
8. **Taxes: Not Pledged: Judgment.** Where defendant's answer made no claim for taxes paid on land bought at an invalid tax sale, but a certain sum was put in evidence, the Supreme Court will render judgment, in a suit to quiet title which went against defendant, for an amount proportionate to the sum paid by defendant upon that part of the land adjudged to belong to the plaintiff. *Chilton v. Nickey*, 232.
9. **Tax Sale: Unknown Heirs.** The petition in a tax sale must describe the interests of the unknown heirs of a deceased owner, otherwise a sale under a judgment rendered thereon is void. After the death of the owner of the land, his heirs must be properly sued, served and allowed their day in court, else their title is not affected by judgment. *Ib.*
10. **Limitations: No Assessment of Taxes: Nonresident Owner.** Where a defendant in ejectment asserts title to the land under the thirty-one year Statute of Limitations (R. S. 1909, sec. 1884), one requirement of which is that neither the plaintiff nor those under whom he claims shall have paid any taxes on the land for thirty years, the plaintiff will not be excused, no taxes having been paid, by a showing that the record owner was not a resident of the State and that the land was never assessed for taxes, said owner having testified that he had made no inquiry about the land and thought it worthless. *Abeles v. Pillman*, 359.
11. **Equity in Hypothecated Notes.** The Lincoln Trust Company of St. Louis, owning \$549,385.56 worth of notes secured by



## TAXES AND TAXATION—Continued.

real estate, placed them with the Union Trust Company, as trustee, to secure the payment of \$500,000 first mortgage gold bonds issued by said Lincoln Trust Company. Then said Lincoln Trust Company sold its equity in the notes to defendant for \$49,385.56, just the difference between the amount of the notes and the amount of the bonds they were deposited to secure. *Held*, that defendant was taxable upon \$49,385.56, the value of its equity, and not upon the full value of the notes. *State ex rel. v. Trust Co.*, 448.

12. **Board of Equalization: Supreme Court: Going Behind Records to Strike off Property Wrongly Added.** In a suit for personal taxes the Supreme Court on appeal is not bound by the records of the board of equalization, but may go behind them to strike off property not legally taxable against defendant, which, so far as the records show, was added to the assessment under the guise of increased valuation. *Ib.*
13. **Board of Equalization in City of St. Louis: Power to Add Omitted Property.** By the Act of 1903 (R. S. 1909, sec. 11407), county boards of equalization were given the power to add omitted property to the assessment, and accordingly, by virtue of Sec. 3, p. 2562, R. S. 1899, which provides that all laws requiring a county officer to perform any duty shall include the corresponding officer of the city of St. Louis, the St. Louis board of equalization has like power to add omitted property. *Ib.*
14. ———: **Notice to Property Owner: Defects Waived by Appearance.** Although the notice to a property owner from a board of equalization failed to state, in accordance with Sec. 11407, R. S. 1909, the kind, class, and value of property about to be added to his assessment, but set out rather that the board proposed to increase his assessment, nevertheless any defects in the notice were waived by appearance. *Ib.*
15. ———: ———: **No Showing of Class to which Property is Added.** The fact that the records of the board of equalization of St. Louis do not show the class to which omitted property was added does not invalidate the action of the board. *Ib.*
16. **General Revenue: Any Public Purpose.** General revenue, collected by the State, by taxation, from all parts thereof, is not the private property of any county or school district, but is the property of the State, and may be appropriated and used for any governmental purpose which the Legislature deems wise; for instance, it may be used in aid of the establishment and maintenance of consolidated schools or rural schools, whose organization the Legislature has authorized. *State ex rel v. Gordon*, 631.
17. **Schools: State-Aid: Appropriation: Aided by Other Acts.** An act which attempts to grant State-aid to consolidated schools and rural high schools and provides that, when certain conditions have been complied with, certain sums of money shall be paid to the district out of the State Treasury, and that the State "shall make adequate appropriations for carrying out" said provisions, must be read in connection with the biennial school appropriation bill; and if, when that is done, both together constitute a "regular appropriation made by law," the act will not be held to be violative of section 43 of article 4 of the Constitution. *Ib.*

THEOSOPHY. See Contracts.

TRUSTS AND TRUSTEES.

1. **Deed of Trust: Substitute Trustee: Sheriff: Ex parte Appointment.** The fact that the court's appointment of the sheriff as substituted trustee to sell land was made on an *ex parte* application of the beneficiary in the deed of trust, does not render the appointment invalid. *Stone v. Railroad*, 61.
2. **Will: Trust: Gift to Church.** A gift by will to a trustee, for the "purchase, construction, furnishing, maintenance and repair" of certain parsonages and churches, and "for the general advancement of Christianity," is valid. *Sandusky v. Sandusky*, 351.
3. **——: Void Clause: Residuary Estate.** Where a bequest in a will is declared void, the will is construed as though that item were not in it, and the amount thereof passes under the residuary clause. *Ib.*
4. **Real Estate: Law of Situs: Trustee Substituted by Foreign Court.** A resident of the State of Maryland devised lands in Missouri to trustees for sale and conversion. On the surviving trustee's *ex parte* application to a court of Maryland he was relieved and another citizen of that State was appointed to and assumed the trust. This last trustee, who was also sole administrator of the testator's estate c. t. a., deeded the lands to one under whom defendants claim. *Held*, that the trustee's deed was ineffectual to transfer the title, only the courts of the situs having jurisdiction to deal directly with real property. *DeLashmutt v. Teetor*, 412.
5. **Conversion: For Purposes of Distribution: Failure of Trust on Final Distribution.** In 1878 a testator in Maryland devised land in Missouri to A, B, and C, three of his executors, in trust that they or their survivors should sell it in whole or in part, at public or private sale, upon such terms and at such time as they might deem most advantageous for the estate, and pay the proceeds to the executors to be distributed according to the provisions of the will. One-sixth of his estate the testator gave in trust for a daughter during her life, to be conveyed to the daughter's children at her death. The sole surviving trustee was relieved by a Maryland court in 1887, the Missouri land being still unsold, and a trustee was appointed whose attempted conveyance to defendant's grantor failed to pass the title. *Held*, that the power of the trustees appointed by the will was limited to conversion for distribution according to the provisions of the will; and that upon final distribution of the estate, their power over lands still unsold ceased, and the legal title to one-sixth thereof vested in the trustee for the testator's daughter, and after the death of the daughter became vested in her children. *Ib.*
6. **Estoppel: Trustee for Life Tenant: Cannot Bind Remaindermen.** A trustee for a life tenant has no more power to bind the remaindermen or their title than the life tenant would have had had there been no trust. Such trustee could not dispose of the remainder by estoppel, or by the ratification of a void deed, any more than she could do it by her own deed. *Ib.*
7. **——: ——: ——: Receiving Proceeds of Invalid Sale: Knowledge.** Remaindermen entitled to a fee in certain prop-

## TRUSTS AND TRUSTEES—Continued.

erty discharged from a trust under the will of their grandfather, are not estopped to object to an invalid sale of the land by a substituted trustee because they accepted a partial distribution of the estate, made up in part of the proceeds of such sale, they having had no knowledge of the sale when they received the distribution. *DeLashmutt v. Teetor*, 412.

## VENUE.

1. **Pleading: Liberally Construed.** Allegations of pleading must be liberally construed with a view to substantial justice. *Orthwein v. Insurance Co.*, 650.
2. ———: **Insurance Policies: Lex Loci: Venue: Margin.** A venue laid in the margin of the petition, thus, "In the Circuit Court, City of St. Louis, State of Missouri," will be the venue for all other matters requiring a venue arising from the petition, none special being pleaded. So that, where the petition is grounded on policies issued by an insurance company, alleged to be organized in another State, but authorized to do business in this State, it will not be *held*, in adjudging its sufficiency to state a cause of action, upon a demurrer thereto, that it is silent as to where the policies were executed or delivered, in that it contains no allegations showing they were governed by the laws of this State; for, if it alleges that the company was authorized to do business in this State at all times mentioned in the petition, that it did business by issuing the policies sued on on a given date, whereby it agreed to do certain things, and that plaintiff paid certain premiums and made certain demands of the company which he seeks to have enforced, those allegations, taken with the venue stated in the margin, are sufficient to authorize a holding that the policies are governed by the laws of this State and the contract is to be construed according to its statutes. *Ib.*
3. ———: ———: ———: **Material Error: Must Be Believed to Exist.** Error, to be reversible, must be material, and the court must believe it material. So that, where defendants demurred to plaintiff's petition, charging it did not state a cause of action, and their demurrer being overruled appealed, the appellate court cannot reverse the trial court's ruling on the theory that it cannot be determined from the petition whether it is a contract under the laws of this State, if it must guess (1) as to whether it states a contract made and delivered in this State or (2) if made and executed in another State whether the law thereof is the same as Missouri's. *Ib.*
4. ———: ———: ———: **Venue: Impliedly Admitted by Demurrer.** A demurrer to plaintiff's petition by necessary implication admits the insurance policies sued on are governed by the laws of this State, if it charges specifically, by way of confession and avoidance, (1) that a named statute does not apply to the facts and (2) that, if held to apply, it must be brushed aside as unconstitutional. *Ib.*

## VERDICT.

1. **Excessive: Negligence: Loss of Leg: Improper Remarks of Counsel.** The plaintiff, a motorman employed by defendant, lost a leg as a result of a rear-end collision with a car which he alleges burned no signal lights behind. His petition asked

## VERDICT—Continued.

for \$50,000 damages, and an instruction authorized the jury, if they should find for him, to assess the damages at "not to exceed" that sum. Defendant's employees fully supported the plaintiff as to the facts of defendant's negligence. Plaintiff's counsel in his argument asked the jury to imagine as plaintiff a female passenger on the car, and when an objection was sustained to that he turned to picture plaintiff's battle with defendant's legal department and claim agents. An objection to that was overruled, and then counsel, until stopped by the court, argued about the objections, once stigmatizing them as "tricks of the trade." The jury returned a verdict for \$20,000, and judgment was entered for \$15,000 after compulsory remittitur of \$5000. *Held*, that, although the conduct of plaintiff's counsel was most reprehensible, yet, since it seems plaintiff would have had a verdict in any event, it is not reversible error; but in view of the fact that the court has hitherto refused to affirm judgments for more than \$10,000 for the loss of a leg, counsel's misconduct affords ground for requiring a further remittitur for \$5000. *Kinney v. Railroad*, 97.

2. —: \$9000. Plaintiff, a strong man twenty-nine years old, with large experience in handling and repairing electrical appliances and in doing signal work on railroads, earning at the time of his injury \$65 per month and prior thereto as much as \$85, while engaged in substituting on a cross-arm of an electric light plant a transformer with a larger one, fell to the ground, breaking a bone at the elbow, which has never been removed, and so tearing loose the muscles from the bone as to render that arm useless. One of his ears was so injured internally that he has lost the power to hear through it; the muscles of one side of the body are withered and atrophied, which has given him a lop-sided appearance; his general health has declined, and his weight been reduced from 152 to 121 pounds; the pains produced by the injuries were so great that within a few hours his reason was temporarily dethroned, and the pains continued for two weeks; and whether or not the loose bone in the arm can be so treated or operated upon that he can again use the arm, is left in doubt by the testimony of the physicians. *Held*, that a verdict for \$9000 is not excessive. *Rutledge v. Swinney*, 128.
3. Using Word Information Instead of Indictment. Where the jury in their verdict say they find the defendant guilty "in manner and form as charged in the information," whereas he was tried under an indictment preferred by a grand jury, the mistake of using the word "information" instead of the word "indictment" is not error. The rights of the defendant are not prejudiced by such mistake. *State v. Taylor*, 210.
4. Two Defendants: Joint Verdict: Irregularly Worded. Where two defendants are jointly indicted for the same murder and jointly tried, a verdict reading, "We, the jury, find the defendants guilty in manner and form as charged in the information and assess their punishment at life imprisonment," violates the express letter of the statute (Sec. 5252, R. S. 1909) which says that when several defendants are jointly tried their punishment shall be assessed separately and not jointly; and it is also imperfect and irregular in that it assesses the punishment at "life imprisonment." But such a verdict is tantamount to a general verdict of guilty, which fails to assess any punishment, since the punishment is erroneously assessed. In such

## VERDICT—Continued.

case it is competent for the court himself to assess the punishment at ninety-nine years' imprisonment in the penitentiary, as he is authorized by statute to do (Sec. 5254, R. S. 1909), instead of at life imprisonment; as the jury evidently attempted to do. Under such circumstances, the verdict is not reversible error, although the court subsequently granted a new trial to appellant's coindictor, and thereafter he was discharged upon a *nolle prosequi*. *State v. Taylor*, 210.

5. **Negligence: Damages: Excessive Verdict.** Where a boiler-maker 57 years old and in good health, earning over \$100 a month, was struck by defendant's cable car, with the result that his nose was broken, his right forearm broken in two places, his skull fractured, his spinal column injured so that five vertebrae have grown together, and until the time of the trial, two years after the accident, although he "did not look sickly," he had been able to do no work and suffered from partial paralysis of his tongue and of the right side of his face, it is *held* that an award of \$15,000 damages was excessive by \$3000. *Holzemer v. Railroad*, 379.
6. ———: **Excessive Verdict.** Where plaintiff, 34 years old and in good health, earning \$100 a month as a switchman in defendant's employ, lost his leg by reason of the negligence of defendant's servants, a verdict of \$15,000 is *held* to be excessive by \$5000, especially in view of the fact that plaintiff's counsel used improper argument to the jury. *Ostertag v. Railroad*, 457.
7. **Argument: Improper: Considered in Reducing Verdict.** While the improper argument of plaintiff's counsel is not reversible error in this case, it is taken into consideration in deciding whether or not the verdict is excessive. *Ib.*
8. **Evidence of Prior Efficiency.** The material issue being the plaintiff's injury, and not his past record, evidence of his efficiency and fidelity throughout a long term of service does not, as a general proposition, help to fix the amount of damages; but where a case presents a flawless trial record, convincing proof of plaintiff's injuries and an absence of evidence of negligence, such evidence is not improper, as supplemental to the main facts; for, it gives moral effect and evidential force to said other facts and thereby assists in determining the amount of damages which should be awarded for the injuries sustained. *Finnegan v. Railroad*, 481.
9. **Excessive: \$25,000.** Plaintiff, an experienced engineer, thirty-seven years of age, in good health, ran his freight train, without negligence, into another train standing partly on the main track and partly upon the track of a branch road; he was earning \$175 per month, and for eighteen consecutive years he had been in the employ of defendant, half the time as a locomotive engineer, and not a single mark of delinquency mars his record of faithful service; he possessed at all times a cool head, a steady hand and a devotion to a hazardous duty scarcely equalled in the industrial world; as a result of the collision he was rendered unconscious, and covered with muriatic acid, which burned him from the elbows to the finger tips, and from the breast bone to the top of the head; one ear was nearly burned off, his eyes were severely burned, and the ligaments attaching the right pelvic bone to the spine were torn loose, and as a result there has been a distortion or dis

## VERDICT—Continued.

placement of the entire pelvis; there was curvature of the spine, and the pelvic bone has shifted two and a half inches out of its normal place; one leg is an inch shorter than the other; a scar tissue has formed over his eyes, as a result of the acid burns, destroying the vision of one, save as to perception of light, and lessening the visual power of the other to the extent of nine-tenths of that of a normal eye; and he is now unable to pursue any gainful avocation. The jury returned a verdict for \$50,000, and, upon a motion for a new trial, the trial court required a *remittitur* of \$25,000 and that being filed overruled the motion.

*Held*, by WALKER, BROWN and BOND, JJ., that the judgment for \$25,000 is not excessive. *Held*, by LAMM, C. J., that it is excessive, and that it should be reduced to \$15,000 and then affirmed. BROWN, J., concurs in affirmation, and recalls what was said by him upon the former appeal, since what he then said was based upon a misunderstanding of the facts.

*Held*, by WOODSON, J., that the verdict for \$50,000 shows passion and prejudice on the part of the jury; and there being evidence of plaintiff's contributory negligence, that prejudice attaches to the entire verdict, and in consequence the rules for a fair trial require a reversal.

*Held*, by GRAVES, J., with whom FARIS, J., concurs, that for the reasons stated in the opinion of BROWN, J., 244 Mo. 643, and in his own opinion, 244 Mo. 616, on the former appeal, the judgment should be reversed, since the record does not show such a change in the facts as to destroy the legal conclusions there reached.

*Held*, upon *per curiam*, that the parties having, since the opinion was written, filed a stipulation agreeing to a judgment for \$10,000, the judgment is affirmed for that amount. *Ib.*

## WILLS.

1. **Partition: During Life Estate: Contrary to Will.** Where the will gave land to testator's son and his wife "during their natural lives and at the death of both to be divided equally between all my grandchildren; but should my son die before his wife the real estate is to be divided equally between my grandchildren and said daughter-in-law, share and share alike," the land cannot be partitioned during the lifetime of said son, even on his petition, the word "divided" indicating clearly that it was the testator's will that no sale or other disposition of the property be made during the life of the son. [Refusing to follow *Reinders v. Koppelman*, 68 Mo. 482; *Sikemeler v. Galvin*, 124 Mo. 367; and *Preston v. Brant*, 96 Mo. 552; and following the more recent cases of *Gullick v. Huntley*, 144 Mo. l. c. 246, and *Stewart v. Jones*, 219 Mo. 614.] *Hill v. Hill*, 55.
2. —: **Divide: Definition.** The word "divide," when given its ordinary and usual significance, means to partition into severalty. *Ib.*
3. —: **Construing Will: Meaning of Terms.** In construing a will, courts derive but little assistance, in determining the meaning to be given the various terms and expressions used therein, from adjudicated cases. No two wills are precisely alike, and the conditions which surround testators differ so widely that conclusions reached in one case are rarely of great service as a guide in another. *Ib.*

## WILLS—Continued.

4. **Trust: Gift to Church.** A gift by will to a trustee, for the "purchase, construction, furnishing, maintenance and repair" of certain parsonages and churches, and "for the general advancement of Christianity," is valid. *Sandusky v. Sandusky*, 351.
5. **Void Clause: Residuary Estate.** Where a bequest in a will is declared void, the will is construed as though that item were not in it, and the amount thereof passes under the residuary clause. *Ib.*
6. **Contest: Careful Consideration of Evidence.** Courts give careful consideration to the evidence in cases contesting the validity of wills, to the end that it may be seen that there is substantial testimony upon the issues of either mental incapacity or undue influence; and especially, to the testimony concerning incapacity, for the reason that opinions of lay witnesses often furnish the basis for the verdict. *Major v. Kidd*, 607.
7. ———: **Law Case.** A will contest is a trial of issues of law, and is governed by the rules of law applicable to legal actions. *Ib.*
8. ———: ———: **Incapacity: Substantial Evidence.** If there is substantial evidence tending to support the charge of testator's mental incapacity to make the will in contest, the verdict of the jury, the instructions being proper, is binding upon the appellate court. *Ib.*
9. ———: ———: ———: ———: **Contestants' Testimony.** If the evidence adduced by contestants upon the issue of testator's mental incapacity is substantial, the issue then becomes a matter for the jury, notwithstanding the contradictory proof produced by proponents. *Ib.*
10. ———: **Undue Protest of Mental Soundness.** Where the will states testator is "now in unusual strength of body and mind," that "I am now in the fuller enjoyment of all my faculties than for many years past" and that "the added years have not lessened my mental faculties," it earmarks itself with a question of his sanity. *Ib.*
11. ———: **Incapacity.** Evidence that testator in 1859, in robust health, both bodily and mentally, was the owner and manager of an exceedingly large farm; that within that year he became mentally unbalanced, and after three physicians had consulted upon his case, he was taken to an asylum for the insane, where he remained for more than a year; that from the day of his return to his death, in 1910, at the age of 93, he attended to none of the business upon that farm, but it was attended to wholly by his wife and brother; testimony of two doctors who had occasion to see and converse with him, and give it as their opinion that he was of unsound mind; testimony of men and women who worked upon the farm, detailing facts which authorize them to express an opinion as lay witnesses and who testify that he was of unsound mind; and testimony of many neighbors, who knew him both before and after he became insane in 1859, and who testify that in their judgment he was of unsound mind during all the years from 1860 to the day of his death, is substantial evidence requiring the

## WILLS—Continued.

issue of his mental capacity to make a will in 1889 and to add a codicil in 1897, to be submitted to the jury. *Ib.*

12. ———: **Sound Mind: Burden of Proof.** The burden is upon the proponents of the will to show that testator was of sound mind. It is not error to instruct the jury that the burden rests upon the proponents to prove, by the greater weight of the credible evidence, that testator, at the time of making the will, possessed a sound disposing mind. The burden is not met by making out a *prima-facie* case, but remains upon proponents throughout the trial. [Following *Goodfellow v. Shannon*, 197 Mo. l. c. 278, *et seq.*, and reviewing all the cases.] *Ib.*
13. ———: ———: **Statute.** Because of of the wording of the statute (Sec. 535, R. S. 1909) declaring that "every male person, twenty-one years of age and upward, of sound mind, may, by last will, devise all his estate," etc., the question of mental capacity of testator is in all will cases. The burden of proving the testator's mental capacity is by said statute placed upon the proponents, not only in the probate court, but in the circuit court, for a will contest is but the probating or rejection of the will. *Ib.*
14. ———: ———: **Ordinary Affairs: Capacity and Necessity of Heirs.** An instruction telling the jury that if testator did not have sufficient soundness of mind "to understand the ordinary affairs of life," he was incapacitated to make a will, is not erroneous.  
*Held*, by BROWN, J., that said instruction in requiring testator to understand the "capacity and necessity" of those who are the natural objects of his bounty, is erroneous, but as that part of the instruction is not relied upon by appellants it is not ground in this case for reversal. *Ib.*
15. ———: ———: **Adjudged Insane.** An instruction telling the jury "that under the law as it existed in 1859 and 1860, it was not required that a person be adjudged insane by any court or tribunal in order that he be placed in the insane asylum, but might be sent as a private patient upon the certificate of two physicians," even if technically erroneous, was harmless in this case, the facts being that testator was taken to an insane asylum in 1859 and remained there for over a year, and made his will in 1889, and the evidence of his incapacity being satisfactory. *Ib.*
16. ———: **Aged Testator: Unequal Distribution: Undue Influence: Testamentary Capacity: Evidence.** Testator when about 81 years old journeyed from his home at Cole Camp to Marshall, Missouri, where he spent several months with his son Henry. While there, having gone with Henry to a lawyer's office, he made a will by which he devised his real estate, worth about \$15,000, to that son, and gave to his six other children respectively \$100, \$500, \$100, \$200, \$15, and \$1000. He then returned to live until his death with his daughter at Cole Camp. In a contest of the will there was evidence, though it was by no means uncontradicted, that for two years before the will was written the testator had, on account of mental incapacity, ceased to attend to his business; and while the attesting witnesses testified that they considered him of sound mind, neither of them had had any acquaintance with him.



## WILLS—Continued.

prior to the making of the will. *Held*, that the questions of testamentary capacity and undue influence were for the jury. *Schieberl v. Schieberl*, 706.

17. ———: ———: ———: **Erroneous Instruction.** An instruction in a will contest which told the jury that if they found the provisions of the will to be grossly unequal and discriminatory, then such inequality and discrimination, if not explained or accounted for, might be considered as tending to show want of capacity to make a valid will, but for that purpose only, was reversible error in that it failed to include other circumstances tending to show mental incapacity. Gross inequality in the distribution of an estate is a circumstance which, when coupled with other circumstances, may tend to show mental incapacity, but standing alone it has no such tendency. [WOODSON and GRAVES, JJ., dissent on the ground that the evidence so conclusively showed mental incapacity that the proponent was not harmed by the instruction.] *Ib.*
18. ———: ———: **Old Age and Infirmary as Evidence of Mental Incapacity: Instruction.** In a will contest an instruction which told the jury that old age, sickness, bodily disease, and infirmities alone furnished no evidence of mental incapacity, and that unless they found testator's mind to have been so unsound that he could not understand the act he was performing, the property he possessed, the disposition he was making of it, and the objects of his bounty, they could not find against the will on the ground of mental incapacity, was rightly refused. Evidence of old age, sickness, bodily disease, and infirmities are all matters to be considered by the jury in determining mental capacity. *Ib.*
19. ———: **Subscribing Witness: Evidence of Facts Upon Which He Bases Opinion of Testator's Capacity.** *Semble* that in a will contest a subscribing witness should be permitted to state on what facts his opinion as to the testator's mental capacity is based. *Ib.*

## WITNESSES.

**Appeal: Credibility of Witnesses: Taking Case from Jury.** The credibility of the witnesses is for the jury, and where in a personal injury action the jury found for plaintiff, whose case was supported by proof, and the court in overruling defendant's motion for a new trial passed upon the weight of the evidence, the defendant cannot upon appeal successfully maintain a contention that the case should have been taken from the jury for failure of proof because, defendant asserts, plaintiff's principal witness showed by his own testimony that he was unworthy of belief. *Holzemer v. Railroad*, 379.

# Rules for the Government of the Supreme Court of Missouri.

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**RULE 1.—Chief Justice, His Duty.** The Chief Justice shall superintend matters of order in the court room.

**RULE 2.—Motions to be Written, Signed and Filed.** All motions in a cause shall be in writing, signed by counsel and filed of record.

**RULE 3.—Argument of Motions.** No motion shall be argued unless by the direction of the court.

**RULE 4.—Diminution of Record, Suggestion After Joinder in Error.** No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

**RULE 5.—Application for Certiorari.** Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

**RULE 6.—Reviewing Instructions.** For the purpose of reviewing the action of the trial court, in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form avoiding repetition and omitting all immaterial matter.

**RULE 7.—Bill of Exceptions in Equity Cases.** In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence may be reduced to a narrative form where this can be done and at the same time preserve full force and effect of the evidence.

**RULE 8.—Presumption in Support of Bill of Exceptions.** The only purpose of a statement, in a bill of exceptions, that it set out all the evidence in the cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

## SUPREME COURT RULES.

**RULE 9.—Making up Transcripts.** The clerks of the several circuit courts and other courts of the first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (*e. g.*): "Summons issued October 2, 1891, executed October 5, 1891," and, if any pleading be amended, the clerk, in making out transcripts, will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading or part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

**RULE 10.—Words Appellant and Respondent, What They Include.** Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff and defendant in error and other parties occupying like positions in a cause.

**RULE 11.—Abstracts in Lieu of Transcript, When Filed and Served.** In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in the court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file ten copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with the clerk of this court. Objections to such complete or additional abstract shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time. (As amended February 26, 1895.)

**RULE 12.—Abstracts, When Filed and Served.** In all cases where a complete transcript is brought to this court in the first instance, the appellant shall deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with the clerk of this court not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file ten copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

## SUPREME COURT RULES.

**RULE 13.—Abstracts, What They Shall Contain.** The abstracts mentioned in rules 11 and 12 shall be printed in fair type, and shall be paged, and shall have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there are no questions made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made over the pleadings, or as to the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

**RULE 14.—Printed Transcripts.** A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases ten printed and indexed, uncertified copies of the entire record, filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with said rule and dispense with the necessity of any further abstracts.

**RULE 15.—Briefs, What to Contain and When Served.** The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last-named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last-named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown the court shall otherwise direct.

In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the pages where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, section, paging or side paging shall be set forth.

## SUPREME COURT RULES.

**RULE 16.—Failure to Comply With Rules 11, 12, 13 and 15.** If any appellant in any civil case shall fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of the respondent continue the cause at the cost of the party in default.

**RULE 17.—Costs, When Allowed for Printing Abstracts and Records.** Costs will not be allowed either party for any abstract, filed in lieu of a full transcript under section 2253, Revised Statutes 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order, or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

In any case in which a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

**RULE 18.—Service of Abstracts and Briefs.** Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

**RULE 19.—Service of Abstract and Briefs in Criminal Cases.** The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of the Supreme Court a printed statement, containing apt reference to the pages of the transcript, assignments of errors and brief of points and argument, and serve a copy thereof upon the Attorney-General, and, thereupon the Attorney-General shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeal as poor persons, by the circuit court, counsel will be permitted to file typewritten briefs and statements. In cases in which the tran-

## SUPREME COURT RULES.

script has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error, shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall have till on or before the first day of the term within which to file his brief and statement.

Hereafter no brief or statement shall be allowed to be filed in a criminal case out of time, as in this rule prescribed; nor will counsel who violate this rule be heard in oral argument, unless in exceptional cases, for good cause shown, by motion theretofore filed, heard and ruled on before the day set for the hearing of the case.

Ordered to be in full force and effect on and after September 1, 1913. [Adopted April 28, 1913.]

**RULE 20.—Taking Record From Clerk's Office.** No member of the bar shall be permitted to take a record from the clerk's office.

**RULE 21.—Motions for Rehearing.** Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division of *in banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

**RULE 22.—Extension of Time.** Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

**RULE 23.—Notice to Adverse Party.** A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his at-

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torney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

**RULE 24.**—A motion to transfer a cause under the provisions of the Constitution from either division to court *in banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

**RULE 25.**—Return of Original Writs. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the court *in banc* as such division or judge in vacation may order.

**RULE 26.**—Assignment of Motions in Civil Causes. All motions and matters in civil causes which have not been assigned by the court *in banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the court *in banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

**RULE 27.**—Assignment of Criminal Causes. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

**RULE 28.**—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after January 1, 1902, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable, and when the appellant for any reason can not or does not file a complete transcript, he shall file within the time allowed by said section of the statutes a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899. (Adopted at October sitting, 1901.)

**RULE 29.**—The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator in original proceeding, and fifty minutes for respondent or defendant in error or respondent in original proceeding. (Adopted at the January sitting, 1912.)

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**RULE 30.**—All motions, briefs, letters or communications in anywise relating to a matter pending in this court must be addressed to its clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties. (Adopted at the July sitting, 1912.)

**RULE 31.**—All rules not included in the foregoing enumeration are hereby rescinded.

**RULE 32.**—Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated. (Adopted December 10, 1912.)

**RULE 33.**—No original remedial writ, except *habeas corpus*, will be issues by this court in any case wherein adequate relief can be afforded by an appeal or writ of error, or by application for such writ to a court having in that behalf concurrent jurisdiction. (Adopted April 2, 1914.)

**RULE 34.**—No oral arguments will be granted by this court on applications for original remedial writs; and before such writs shall issue, the applicant therefor shall give not less than five days notice thereof to the adverse party, or his attorney. Such notice shall be in writing, accompanied by a copy of the application for the writ, and the suggestions in support of same. The adverse party may file in this court suggestions in opposition to the issuance of the writ. Whenever the required notice would, in the judgment of the court, defeat the purpose of the writ, it may be dispensed with. On final hearing printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in other civil cases. (Adopted April 2, 1914.)

**RULE 35.**—No writ of *certiorari* shall be granted to quash the judgment of a Court of Appeals, on the ground that such court has failed or refused to follow the last controlling decision of the Supreme Court, unless the applicant for such writ shall give all parties to be adversely affected, or their attorneys of record, at least five days notice of such application; and the applicant shall, in the petition



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of not exceeding five pages, concisely set out the issue presented to the Court of Appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found. Said petition shall be accompanied by a true copy of the opinion of the Court of Appeals complained of, a copy of the motion for rehearing or to transfer the cause to this court, a copy of the ruling of the Court of Appeals on said motion, and suggestions in support of the petition not to exceed six printed or typewritten pages.

The notice to the party to be adversely affected shall be printed or typewritten, accompanied by a true copy of the petition, and all exhibits and suggestions in regard thereto. The party to be adversely affected may file on or before the day preceding that fixed by the notice, suggestions of not more than five printed or typewritten pages, stating the reasons why such writ should not issue. (Adopted April 2, 1914.)

Ex 5115  
6/12/12











